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DIARY FOR MARCH.

1. Friday *St. David's* School reports to be made. Supt. of Sep. Sch. to give notice to Clerk of Municip.
3. SUN... *Quinquagesima.*
4. Mon... Last day notice of trial for Co. Court. Recorder's Court sits.
5. Tues... *Shrove Tuesday.*
6. Wed... *Ash Wednesday.* Notice for Chancery rehearing term to be served.
10. SUN... 1*st Sunday in Lent*
12. Tues... Quarter Sess. and Co. Court sittings in each Co.
14. Thurs. Error and Appeal sittings. Chancery rehearing term begins.
17. SUN... 2*nd Sunday in Lent. St. Patrick's Day.*
24. SUN... 3*rd Sunday in Lent.*
25. Mon... *Lady Day.*
27. Wed... Appeals from Chancery Chambers.
31. SUN... 4*th Sunday in Lent.*

NOTICE.

Subscribers in arrears are requested to make immediate payment of the sums due by them. The time for payment so as to secure the advantages of the lower rates is extended to the 1st April next, up to which time all payments for the current year will be received as cash payments.

THE

Upper Canada Law Journal.

MARCH, 1867.

TRADES UNIONS AND CO-OPERATIVE ASSOCIATIONS.

The struggles between labour and capital have been of long duration. But inasmuch as capital is generally represented by the few who are powerful, and labour by the many who are without the power of wealth, co-operation, or combination on the part of the latter has has been found necessary. Fair play is the object to be attained; but man, in affairs of business, is essentially selfish. The employer wishes to have his work done for as little as possible, while the employed wants as much as possible for his labour. The opposite interests produce conflict, and when the conflict is long continued, distress and loss to the one party or the other, if not to the public, is the sure result.

The law has ever watched combinations of masters or workmen with a jealous eye. The interest of the public is the steady progress of commerce and manufactures. Whatever tends to interrupt this progress, attracts attention, and at times is visited with punishment. How far it is lawful to combine, and when unlawful, shall be the subject of our present enquiry.

It was at one time supposed, both in England and the United States, that a combination of workmen to raise their wages was illegal, (per Grose, J., in *Rex* v. *Mawbey*, 6 T. R. 619, 636,) and if followed by overt acts, was indictable (see *People* v. *Fisher*, 14 Wendell, 9; contra, *The Commonwealth* v. *Hurst*, 4 Metcalfe, 111). The Legislature of England, by various statutes, from the reign of Edward the First to that of George the Fourth, prohibited agreements either of masters or workmen, for the purpose either of raising or lowering wages, or of altering hours for labour, or otherwise affecting their mutual relations. These agreements were by some of the statutes enacted to be, and by others declared to be illegal, and the parties entering into them made subject to punishment. But by the English statute, 6 Geo. IV., cap. 129, an entire change of the law was made. By section two, all the statutes prohibiting such agreements are enumerated and absolutely repealed. By section three, prohibition is restricted to endeavours by force, threats, or intimidation, molestation, or obstruction to affect wages or hours, and these are declared illegal and punishable. By sections four and five, it is declared that neither masters nor workmen shall be punishable for agreements in respect of wages or hours, unless they infringe the provisions of section three.

Judges in expounding this statute have used language denoting that, in their opinion, the agreements either of all masters or all workmen, either as to wages or hours, unless within section three of the Act, are legal (see *Regina* v. *Harris*, Car. & M. 661; *Regina* v. *Selsby*, note *a* to Rowlands' case, 2 Den. C. C. 384; *Regina* v. *Rowlands*, 17 Q. B. 671, 686; *Hilton* v. *Eckersley*, 6 El. & B. 47).

It therefore becomes of importance to know precisely the language of section three, and it is as follows:—"If any person shall, by violence to the person or property, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeymen, manufacturer, workmen, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent, or endeavour to prevent, any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or

property of another, or threat or intimidation, or shall molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions o. regulations made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of w. king, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting or carrying on such manufacture, trade or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen or servants, every person so offending, or aiding, or abetting, or assisting therein, being convicted thereof, shall be imprisoned only, or shall and may be imprisoned and kept at hard labour for any time not exceeding three calendar months."

This section does not subject to punishment persons who meet together for the sole purpose of consulting upon and determining the rate of wages or prices which they shall require or demand for their work, or for the hours or time for which they shall work in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which they shall require or demand for their work, or the hours of time for which they will work (s. 4).

Nor does the section subject to punishment any persons who may meet together for the sole purpose of consulting upon or determining the rate of wages or prices which they shall pay to their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or price which they shall pay to their journeymer workmen or servants, for their work, or th hours or time of working (s. 5).

A threat, within the meaning of section three must be an intimation made with the intentio of forcing or unduly influencing the conduc of the person to whom it is addressed. It i now, however, too late to say that the wor threat is limited to the declaration of an in tention to d which have an intimat connection with personal violence. The case that have been decided show that the wor must have a wider sense, viz.: a threat by act or words, for the purpose of doing some injury to another person. But it is essentia that it should be made for the purpose of inti midating the person to whom it is addressed (see *Walsby* v. *Anley*, 30 L. J., M. C. 121; *O'Neill* v. *Longman*, 4 B. & S. 376; *Hilton* v. *Eckersley*, 24 L J., Q. B. 353; *Wood et al.* v. *Bowron*, 2 L. R., Q. B. 21, S. C., 10 Cox, C. C. 344; *Hornby* v. *Close*, 2 L. R., Q. B. 153).

No doubt it was supposed by the Legislature, when passing this Act, that if workmen on the one hand refused to work, or masters on the other refused to employ, such a state of things would not long continue, and that the party whose pretensions were not founded on reason and justice would ultimately give way—the masters, if they offered too little, or the workmen, if they demanded too much. But the frequent disagreements in England between employers and workmen have been found to cause so much private suffering and public loss, that the Queen in her recent speech, when opening the present session of the Imperial Legislature, drew attention thereto, and announced her intention of issuing a commission to enquire into and report upon the organization of Trades Unions and other Societies, whether of workmen or employers, with power to suggest any improvements of the laws that may be found necessary.

The result will be looked for with great interest. The attempt to prevent collisions between capital and labour, and yet preserve to each its peculiar rights, is, though simple in theory, most difficult in practice. It is the right of the capitalist to have labour at a fair compensation, and it is the right of the labourer to have a fair compensation for his personal strength, energy and skill. But as each views the amount of "fair compensation" from his

own stand point, it is no wonder that they often disagree. Complete legislation on such a subject is impossible, and yet some legislation is necessary, and so far as England is concerned, further legislation is imperatively demanded.

RULES OF COURT.

The following rules were promulgated during the sittings of Hilary Term—

It is Ordered,—That the following rules shall come and be in force in the Courts of Queen's Bench and Common Pleas, from and after the last day of this present Hilary Term:—

1. In "Easter" and "Michaelmas" Terms, the first Friday, the second Monday, the second Wednesday, and the third Monday, will be "Paper Days" in the Court of Queen's Bench; and the first Saturday, the second Tuesday, the second Thursday, and the third Tuesday, in the Court of Common Pleas.

2. County Court appeals must be set down for argument for the first or second Paper Days of each Term, such day being the first Paper day next after the date of the Appeal Bond, unless leave be granted by the Court, upon special affidavit, to set it down for a subsequent Paper Day: and the Court will hear County Court appeals on the first and second Paper Days of each Term in preference to the other cases set down upon the Paper.

3. On the last Tuesday and Friday in "Easter" and "Michaelmas" Terms, the Court of Queen's Bench; and on the last Monday and Wednesday, in the said Terms, the Court of Common Pleas, will take the New Trial Paper, and proceed therewith, in like manner as on the other days appointed by Rule of Court for that purpose.

Dated 12th February, A. D. 1867.

(Signed) Wm. H. Draper, *C. J.*
Wm. B. Richards, *C. J., C. P.*
John H. Hagarty, *J., Q. B.*
Jos. C. Morrison, *J., Q. B.*
Adam Wilson, *J., C. P.*
Jno. Wilson, *J., C. P.*

JUDGMENTS—HILARY TERM, 1867.

COURT OF ERROR AND APPEAL.

Present — Draper, C. J.; The Chancellor; Richards, C. J. C. P.; Hagarty, J.; A. Wilson, J.; J. Wilson, J.; Mowat, V. C.

Thursday, March 14, 1867

Grant v. *Brown.*—Appeal from Court of Chancery allowed and bill dismissed.

McKenzie v. *Yielding.*—Appeal from Court of Chancery dismissed with costs.

Hunt v. *Spence*—Appeal from Court of Chancery dismissed with costs.

Flower v. *Duncan.*—Appeal from Court of Chancery dismissed with costs.

Clissold v. *Machel.*—Appeal from Court of Queen's Bench dismissed with costs.

Friday, March 15, 1867.

Commercial Bank v. *Wilson.*—Case remitted back to Court of Chancery, with a declaration that judgment at law is totally void.

Dickson v. *McFarlane.*—Appeal from Court of Chancery, dismissed with costs, Hagarty, J., dissenting.

Commercial Bank v. *Cotton*—Appeal from Court of Common Pleas, dismissed with costs, Draper, C. J., Van Koughnet, C., and Mowat, V. C., dissenting.

Pettigrew v. *Doyle*—Appeal from Court of Common Pleas, dismissed with costs, Draper, C.J. Van Koughnet, C., and Hagarty, J., dissenting.

QUEEN'S BENCH.

Present:—Draper, C. J.; Hagarty, J.; Morrison, J.

Monday, March 4, 1867.

Acre v. *Livingstone.*—*Held*, that the words "remise and release" are not sufficient to operate as words of conveyance, where there is no previous estate for them to operate upon. (Hagarty, J., *dissentiente.*) Rule absolute for new trial, without costs.

Waddell v. *Robertson.*—Appeal dismissed with costs.

Gore Bank v. *Crooks.*—Rule absolute to enter nonsuit, and plaintiff's rule discharged.

Irwin v. *Donnelly.*—Rule nisi discharged.

Parsons v. *Pharibee.*—Rule absolute for new trial on payment of costs.

The Queen v. *Cammell.*—Conviction quashed.

Davidson v. *McKay.*—Rule nisi discharged.

Foster et al. v. *Glass.*—Rule nisi discharged. Leave to appeal granted subsequently.

Mitchell v. *Barry.*—Rule absolute for new trial. Costs to abide the event.

Jackson v. *Kassell.*—*Held*, that an affidavit of affiliation to the effect that defendant was the father of her child, and not saying "really the father," as required by the statute Con. Stat. U. C. cap. 77, is bad. Rule absolute to enter a nonsuit.

Walmsley v. *Walmsley.*—Judgment for tenant on both demurrers.

The Queen v. *Connolly.*—*Held*, that an attempt to have connection with a lunatic, with her consent, is no offence; and *Per Cur.*, conviction quashed.

Scragg v. *The Corporation of the City of London.* *Held*, that the beneficial occupant of city property is subject to taxes, though the property itself is exempt from taxation. *Held also*, that the decision of the Court of Revision, or a County Judge, on the complaint of a person complaining of being improperly placed on the assessment

roll, is final. (Morrison, J., *dissentiente* on the first point). *Per Cur.*, judgment for defendant on all the demurrers.

Offay v. *Offay.* — *Held*, that an absconding debtor is entitled to appear at the trial, and defend in mitigation of damages. Appeal from the decision of the judge of the County Court of Huron and Bruce allowed without costs.

Board of Grammar School Trustees and the Village of Trenton —Rule discharged.

Saturday, March 9, 1867.

Kerr v. *Douglas.*—Rule absolute.

The Queen v. *Magrath.*—Conviction affirmed.

Britton et al v. *Fisher.*—Rule discharged.

In the matter of the Sheriff of the County of York and the Recorder of the City of Toronto.—*Held*, that the Sheriff of the County of York, and not the High Bailiff, is the proper person to take part in the selection and summoning of jurors. Rule absolute.

Attorney General v. *Halliday.*—Rule discharged; leave to appeal, on the points where leave was necessary, refused.

The Queen v. *Clement.*—Rule discharged.

Jordan v. *Gildersleeve.*—Rule absolute to set aside rule.

Marrs v. *Davidson.*—Rule discharged.

Lyster v. *Kirkpatrick* —Rule absolute for eight days further time, to give notice of appeal, upon payment of costs.

In re County of Lincoln and Town of Niagara. —Rule nisi on sixth and seventh grounds.

COMMON PLEAS.

Present:—Richards, C. J.; Adam Wilson, J.; John Wilson, J.

Monday, March 4, 1867.

Ralston v. *Hughson* —*Held*, 1. That in ejectment by an execution creditor under a sheriff's deed against the judgment debtor, it is unnecessary to prove the judgment. 2. That a judgment roll produced by plaintiff and afterwards by consent of the court withdrawn, is as if never produced. Rule absolute to enter verdict for plaintiff.

Mahar v. *Fraser.*—Rule absolute for new trial on payment of costs.

Thompson v. *Bennett.*—Rule absolute to enter a nonsuit.

Burnside et al. v. *Marcus.* — Rule nisi discharged.

Marcus v. *Smith.*—Rule nisi discharged.

McRae v. *McGauvrean.*—Rule absolute for new trial, costs to abide the event.

McCormick v. *McGauvrean.*—If plaintiff elect, on or before 18th March, to reduce his verdict to 50,000 feet, and consent to a verdict being entered for defendant as to the residue, then rule to be discharged; otherwise, rule for new trial on payment of costs, on or before 4th April next.

Kelly v. *Irwin* —Rule absolute to enter verdict for plaintiff on four counts, for $120 damages, and for defendant on remaining counts: in other respects rule to be discharged.

White v. *Cuthbertson.* — *Held*, that where an insolvent lives in Upper Canada there can be no assignee appointed who is resident in Lower Canada. *Per Cur.*, judgment for defendant on demurrer.

Sanderson v. *Roe.*—Judgment for plaintiff on demurrer, with leave to amend on payment of costs within a fortnight, defendant undertaking to plead issuably, and go to trial at the next assizes.

Stewart v. *Harrold* —Verdict to be entered for plaintiff for a portion of the land, and for defendant for the residue.

Van Koughnet v. *Allen.*—Stands till Saturday.

Bank of Montreal v. *Scott.* — Rule nisi discharged.

Richardson v. *The London and Liverpool Insurance Co* — Rule discharged. Richards, C. J., *dissentiente.*

Saturday, March 9, 1867.

Killbride v. *Cameron.*—Rule discharged. John Wilson, J., *dissentiente.*

Douglass v. *Barrier.* — Rule absolute for new trial on payment of costs.

Smith and Mucklestone.—Appeal from the decision of the Judge of the County Court of Frontenac, dismissed with costs.

Fisher v. *Holden.*—Judgment for defendant on the demurrer.

Taylor v. *Brown.*—Judgment for defendant on the exceptions to the first count of the declaration.

The Queen v. *Muir.*—Stands.

Van Koughnet v. *Allen* —Rule to be discharged, on defendant's undertaking to file by-law permitting plaintiff to remain in possession of the property claimed by the corporation.

SELECTION.

SIR EDMUND SAUNDERS.

When a chief gives the rule "to the satisfaction of the lawyers," he may be said to have purchased to himself, in law, a good degree. It may, possibly be said, that the world cares little for the judges of the days of Charles II., indeed, that Mr. Foss, the eminent judicial biographer, has, with others, supplied any information which might be desired upon the subject. But all are not able to avail themselves of Mr. Foss's extensive labours, and the writer of this had scarcely seen his life of Saunders when this memoir was completed. The career of the Chief Justice is, moreover, especially interesting and instructive. It is always refreshing to dwell upon the privileges of our free country, in which the thews and sinews of manhood confer the power upon their possessor of emerging from the humblest condition to high estate in society. It is easy to stamp an ignoble paren-

tage upon one whose merits have forced him into eminence. If, therefore, we were to hear that Saunders was *nullius filius*, we must regard the story, not as quite fabulous, but as deserving of the strictest investigation. As soon as a man has won success, he is a mark for the whole world, and we can appeal to our contemporaries for numerous instances where the most blatant falsehoods have been copiously and unblushingly uttered by a class whose bitterness knows no measure in the face of intellectual superiority ever commanding its natural march to preferment. But just before we enter more fully upon the biography of Edmund Saunders, we must not omit to mention with due honour his splendid annotator, Mr. Serjeant Williams, nor the able lawyer of the Common Pleas, Mr. Justice Williams, who has edited his father's notes, and whose work on executors raised himself at once to high distinction as an author. The serjeant took a great delight in his notes, and he was fond of riding on horseback. He would say when mounting, to Richardson, afterwards the judge, "Now, I'm going to make a long note." These elaborations are familiar to every reader of Saunders.

Saunders' obscurity of birth may be shortly passed over. Of his parents, of his relatives, little is known, and, as to any matrimonial alliance on his part we are equally uninformed. His father died, and his mother married a man named Gregory, by whom she had several children. During the siege of Gloucester, his mother's cottage was levelled to the ground. Possibly Saunders might have left his home at that time in quest of subsistence. He may be said to have stood alone in his generation. We find him, however, in Clement's Inn, a smart, industious lad, very obsequious, and especially to the attornies and their clerks. Civility, constantly employed, is with difficulty resisted, and even in the higher classes, the hollowness is often unmistakable, and yet the plausible manner is winning.

"Animus audax, subdolus, varius,
Cujuslibet rei simulator ac dissimulator."

At length, the society of Clement's Inn were willing to help Saunders. He was beyond question, an able scribe, ambitious of "penmanship," and, doubtless, did much small work both for high and for low lawyers. And this he did, in the first instance, on a board, put up by the Inn as a desk, on the top of a staircase. Now, in order to reconcile the rapid advancement he met with to the rules of ordinary sense, we must claim for him the meed of great forensic talents.

"Ingenium ingens,
Inculto latet hoc sub corpore."

After the humblest efforts at the desk, he took what was called, "hackney business," on his own account, for which he got "a few pence." This by no means contented him. He borrowed books, made himself acquainted with forms, and, to use the words of Lord Keeper North, became "an exquisite entering clerk." In winter, while at his work, he covered his shoulders with a blanket, tied hay bands round his legs, and made the blood circulate through his fingers by rubbing them when they grew stiff." And this sign of ability was verified in him: the more he exerted his faculties, the more they expanded, till, at length, he ventured to turn his mind to that most difficult science, "Special Pleading," moreover, to take a small chamber and furnish it. Of his success in this art, we shall quickly see that his reports afford the most brilliant testimony. It seems that he was, for some time, a practising attorney. There can be but very little doubt that he followed this vocation; and the success he acquired was mainly owing, in his particular case, to the early attachment which he formed to clerks and their masters. It might have been thought that after this great rise by a man of the lowest origin, he would have been content, and plodded through life with his ungainly figure and still more strange habits. But the men of his day were the favourites of fortune, up to-day, down to-morrow. It mattered little whether their early advocacy was fed by fostering disputes in a gaol, or whether, when advanced to dignity, a charge of perjury might not have been interposed, so as to call from the sovereign the exclamation, "This must not be." With some of these Saunders was, by comparison, the model of rectitude, so that a young man of ordinary ambition might have but little scruple in venturing his prospects at the bar. Special pleaders under the bar were unknown in his time; indeed, there were but four eighty years since. Master, therefore, of pleading, he stepped at once to the bar, and to fair practice. It is well known that an attorney becoming a counsel is usually supported by the body, and with such zeal, that we have two, at least for chancellors, Hardwicke and Truro, who belonged to that rank. With regard to others, not akin to such patrons, it may be said—between the venture and the triumph lie oceans. He was admitted as a student in the Middle Temple on the 4th of July, 1660, as Mr. Edmund Saunders, of the county of the city of Gloucester, gentleman, and was called in less than four years afterwards.

Scarcely six years had passed after the Restoration, when the great pleader was nearly in every cause of moment; and it is recorded of him that he had the good tact to retain his clients whom he had gained. He had the habit of a great lawyer of the present day, who, from his youth up, was wont to present the same principle in different aspects until it was fully understood. This course may sometimes be tiresome to judges, but it gains the hearts of clients. "What makes you labour so?" said Twysden to Saunders; "The court is of your opinion and the matter clear." Saunders was then a young man—He was

tenacious of his legal knowledge. Some superfluous words got into a plea, which now would be instantly rejected, but the court sustained the objection, and against Saunders, who very quietly added to his note—"But I believe their principal reason was, because they would not determine the matter of law." On the other hand Saunders was contending that a fault in a declaration was matter of substance. Hale, *cæteris tacentibus*, ruled that it was only a matter of form. Yet Saunders urged that there were twenty books to prove it matter of substance. The chief confessed this, but he said the opinion had been otherwise for ten years past—"But I believe he meant his own opinion, said the reporter." It is curious that Levinz, a great advocate of his day, began to take notes in the same year with Saunders; the latter, with some exceptions, contributed those cases in which he was chiefly concerned.

Levinz reported more at large, but was careful to supply on his part, the cases in which he had been counsel. At the time when forensic fortune was smiling upon Pemberton, Winnington, Maynard, Sir William Jones, Saunders, and others, his contemporaries, the latter was, most likely, living at a tailor's house in Butcher Row, with the landlord's wife for a kind of nurse to him, a very questionable kind of nurse, according to evil disposed people. Their names were Gilbert and Jane Earle. Now he might have required some occasional attention, for he was seldom without a pot of ale, served in court, and placed on the forms where the lawyers sat. Strange as this may seem, it is not so very extraordinary, if it be true that a judge of high place in one of our criminal courts was wont to have a bottle of port on the bench beside him after dinner. And truly there may be other instances. With all his intense labour, all the drafts upon his acute mind, all the energies he was obliged to display in court, the subject of this memoir seems to have been peaceable and content in the domestic circle he chose for himself. He was fond of piping, an art not very high in the scale of harmonics, but one which Virgil's shepherds loved, whose songs were "formed on fancy and whistled on reeds." But unlike to Arcadia, he drank brandy and beer the while, laying a foundation of the disorder which cut short his judicial and his pastoral life. The pipe, however, was not his only accomplishment Being invited to dine with North, the Chief Justice of the Common Pleas, he played some jigs upon the harpsichord which he learnt upon an old instrument at his landlady's. It does not appear that he was ever invited again. Nevertheless, amidst all this dissipation, he had the prudence to hand over his money which he got in profusion, to his host and hostess, and there is every reason to believe that they dealt honestly by him. He was, it may be remarked, in himself honest in worldly matters.

And now that we are in the heart of his professional career (we will come to speak of his contemporary antagonists immediately) we must pause for a moment. Sir Matthew Hale, and Saunders, the eminent advocate were constant companions in court. Hale was not the likeliest judge to admire Saunders, although Saunders was too easy a man to conceive any great dislike to any one, far less to Hale, whom he reverenced according to his ideas of respect. In themselves, Hale might have been called a saint; he prided himself upon purity of character and conduct. His father had abandoned the law by reason of its supposed subtleties; he himself was a good criminal lawyer, and, in his day, burnt a witch, and was quite enough skilled in pleading to see through Saunders' able traps. Hale was sober and modest to a fault, Saunder never pretended to either of these virtues; yet if Saunders was on his guard against the Lord Chief Justice, the latter, in his turn, knew that he had a formidable legal foe in the advocate on the bench beneath him. It naturally followed that Hale conceived the strongest suspicions of an unfavourable character towards the pleader, and, when he conveniently could, fell upon him, if we may speak, in open court. Such rebuffs and reprimands must have damaged a lawyer of inferior attainments, for attorneys are not prone to employ counsel who have decidedly lost the ear of the court. But whoever will take the pains to read the reports of this master of the forum with even ordinary attention will quickly come to the conclusion that the pet of the attorneys would not be easily shaken by a "gloam from a great man." In truth, he was far less corrupt than many of those around him. Such was the faithlessness of the times that the very introduction of a "Quirk" might, strange to say, produce substantial justice. An example of this may be offered in a case before Lord Chief Justice Kelyng, who must have prejudiced Hale, when chief baron, against Saunders. A man gave a bond of submission, with a penalty of £2,000; the matter was referred to arbitration. The award was that the defendant should pay £3,100. Saunders, his counsel, knew that nothing was due in respect of the original debt; so, by an effort of skilful pleading, he strove to evade the inevitable course of the law. For there was the penalty, and the submission to arbitration was a crushing part of the case. Whatever the subtlety might have been, it was probably nothing more than a legal quibble, common, sad to say, to all periods of our history. His readiness and fortitude did not, however, forsake him; he showed much spleen at the interruption of Kelyng and declaimed against the hardship upon his client, whose payment was fixed at £1,100 more than the penalty, admitting the existence of a debt. True, on the one hand, constant disappointment and censures sour the temper, deaden the faculties, and sicken the heart. But, on the other, our

forensic friend was never crabbed; his wit was ever active, and heart always merry.

Johnson was fond, says his biographers, of collecting a crowd round him, and letting the exuberances of his wit flow for the diversion of the bystanders. It was no wonder that he left Oxford without a degree, for he was not over fond of subordination, and he laughed at discipline.

Saunders had a number of young men hanging about him when he moved about in the Temple. He would stand at the bar, before the sitting of the court, and put and debate cases with them, and urge them to industry, and many a joyous jest would he pass with them. They voted him almost a Silenus—

"Inflatum veteri venas, at semper, Iaccho.
Et gravis attritâ pendebat cantharus ansâ."

The coarseness of his humour was in keeping with his day. We will only give one instance. Speaking of his having no children (he had none), he said, "By my Troggs, none can say I want issue of my body, for I have nine in my back."

Some few words as to his contemporaries during his battles in court.

Sir William Jones was a famous attorney-general of that period. He was in much business, and not unfrequently opposed to Saunders. In parliament he advocated the Exclusion Bill with great force. But he was morose and uncompromising, so that the court party could not endure him. Nevertheless, the great seal was offered to him, but he tired of his profession, like Mingay, the well-known king's counsel of later years, and shunned preferment in the zenith of his fame. At one time he was so high in estimation as to have the care of remodelling the bench of judges. It was at the juncture when Lord Danby's friends were turned out and some barons of the Exchequer, who did not give satisfaction in their office. A friend of Essex and Russell, and a staunch opponent of the *Quo Warranto Informations*, his unpopularity with the government increased after his retirement from practice, and had he not died in 1 82, it is surmised that he might have been involved in the Rye House Plot.

We may also mention Kelyng or Keeling, the son of the Chief Justice (the only lawyer who was king's counsel and king's serjeant, and he not a real king's counsel, but only for the occasion, and without salary).* Winnington, afterwards solicitor-general, a noted lawyer of that day; Coleman, a person of considerable repute, and often opposed to Saunders; Convers, afterwards Chief Justice of Chester; Weston, Powys, and Powlet. Lastly, there was that extraordinary man who stood, beyond comparison, at the head of his profession, Serjeant Maynard. The singular pliancy of Maynard enabled him to steer safely through four very unstable governments. He began his career in the reign of the first Charles; he was the Protector's serjeant, and, then, all being forgotten, he was made a king's serjeant at the restoration; he passed through the reign of Charles II. in the plenitude of business, and having wisely remained tranquil during the brief dominion of James, became William III.'s Chief Commissioner of the Great Seal, when nearly ninety. There were some curious passages between Maynard and Jeffreys. Jeffreys, who never failed to abuse all within his reach with fearless impudence, stood in awe of Maynard, and of him alone. Jeffreys, though quick, was not accurate, so that a stormy discussion would often arise between him and the bar. Upon such an occasion Maynard would rise as *amicus et censor curiæ*, and calmly explain what the law really was. Upon this, Jeffreys would instantly take up the matter as Maynard put it, and woe to him who should pretend to dispute the serjeant's view! The only formidable adversary of this great man was the future Chief Justice, Sir Edmund Saunders. In a word, what the latter wanted in artifice (we fear we must use that expression), he made up by an admirable cunning disguised under simplicity, and backed by special pleading.

The life of a distinguished lawyer, great though he be, is soon summed up. Saunders was a reporter for about four years, and as he had no particular political bias, but was willing to obey the powers that be, as soon as Pemberton was removed, the court cast an eye on him as a fitting judge to carry out certain state achievements which they had at heart. For he was already the chief draftsman in all indictments and informations on behalf of the Crown. However, he was counsel for Mrs. Price, indicted in 1680, for an attempt to stifle the Popish Plot, but he did not succeed against Dugdale, the notorious witness. He was also counsel for Viscount Stafford, but did not argue much. He was counsel against Fitzharris in 1681, against whom he was unnecessarily severe, even rude, but his law was conspicuously eminent when compared with the pleading of the numerous Crown counsel for the prosecution. In 1681 he was counsel against Lord Shaftesbury; but in 1682 he appeared to support Lord Danby on his application to be bailed, and upon this trial we find the dry answer which he made to the wrathful Pemberton, who insisted that Saunders attempted to impose upon the court by attributing opinions and remarks to them which the Chief Justice said they had never made. This was not so very unlikely; but Saunders quietly begged pardon if a mistake had been made, only, "he did believe the rest of his brethren took it so as well as himself." And he had avoided the intrigues of faction by his invincible good humour and matchless shrewdness.

* This Sir John Kelyng was king's counsel extraordinary. He was what Wynne calls "individuum vagum." For want of attending to this distinction, many have pronounced Bacon the first king's counsel instead of North or Turner, whereas Bacon and Kelyng were merely *extra ordinary*, without salary or fee, whereas the king's counsel had £40 a-year.

Now it was contemplated at court that if, under a fair pretence, the charters of the kingdom could be seized, a magnificent triumph over their opponents, the enemies of the Duke of York and of Popery, would be gained. And they had another object within their hopes which historians have dealt with, though scantily; the refreshing by fines, of a lean exchequer. In the year 1682 he was made a Bencher of his Inn, and the 22nd December, Saunders was made Chief Justice of the King's Bench, and was knighted. He was called Serjeant on January 13, and took his seat on the same day. He had not the slightest idea of such a promotion, and he scarcely seemed to wish it, for he must needs leave his tailor and Butcher Row, and emigrate to Parson's Green. It was supposed that the King liked him for his jovial behaviour, so he gave "*Principi sic placuit*" rings.

He did not, however, survive his promotion for one year, and, before his death he was so lost, that when his brethren came to him to enable them to confirm his opinion against the city on the *Quo Warrantos*, he expostulated with them, asking "why they would trouble him, when he had lost his memory." So he died at Parson's Green, on the 19th of June, 1683, in the 51st or 52nd year of his age, of, it is said, apoplexy and palsy. He was never sworn of the privy council, although when Pemberton was finally removed from the bench, he was consoled with that distinction. Saunders heard the arguments on the law warrants against the city, and he presided at the trial of Sir John Pilkington and others, for a riot, and assault upon the Lord Mayor, Sir John Moore, who warmly supported the court party in the dispute concerning the election of sheriffs When the defendant's counsel in this case came to challenge the array, Saunders broke out—"Gentlemen, I am sorry you have so bad an opinion of me as to be so little of a lawyer as not to know that this is but a trifle, and nothing in it. Pray, gentlemen, don t put these things upon me." Here the judge reflected that he was really beloved by the bar for his good nature, and so he went on,—"Because I am willing to hear anything, and where there is any colour of law I am not willing to do amiss; therefore, you think I am now become so weak that you may put anything upon me." He had a strong remembrance of Hale,—"You would not have done this before another judge. You would not have done it if Sir Matthew Hale had been here." The defendants were convicted and fined.

The death of this Chief Justice was probably a coincidence. The sedentary employment of a judge would scarcely have accelerated his end in so short a time. Relief from the toil of advocacy would rather have had a favourable tendency. He was badly, mortally diseased before his appointment, and it was a marvel that his mind, even for so few months, was competent to sustain his enfeebled body.

It is difficult to speak of a man's character of whom it can scarcely be said that he had any. The reader can form his own judgment from the materials we have supplied. It is affirmed that he never deserted the tailor and his wife, although he moved into the country. And certain it is that he must have kept his eye upon his relations in the country, since he mentioned them so distinctly in his will. He left something considerable behind him, which he derived, probably, from the care of these people. His will was dated 23rd Aug. 1676, republished 2nd Sept. 1681, and proved 14th July, 1683. His executor and executrix were the tailor and his wife, and they were made residuary legatees, "as some recompense for their care of him, and attendance upon him for many years." His works must be at once comprised in his immortal reports. His book has been called the Bible, and he himself by the great Lord Mansfield, the Terence, of Pleaders.—*Law Magazine.*

UPPER CANADA REPORTS.

PRACTICE COURT.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court.*)

In the matter of Arbitration between Thomas Burns and D. M. Potter.

Arbitration—Service of notice of award and demand of payment.

A County Court and a Division Court suit, and all disputes, were referred to arbitration, and a sum of money awarded to be paid by A. to B. after ten days' notice of the award. This notice was served upon the attorney who had acted for A. on the arbitration, but who disclaimed any right otherwise to represent him. *Held*, that the service was insufficient.

[P. C., H. T., 1867.]

On a reference of a County Court suit and a Division Court suit, and all matters in dispute between the parties, to the County Judge of Wellington, an award was made directing, among other things, that $40 57 should be paid by Potter to Burns, together with a proportion of the costs. The award directed that the sum awarded should be payable "in ten days after notice of this my award."

In December last, shortly after the making of the award, the attorney who had acted for Potter in the arbitration was served by the attorney for Burns with a notice of the award having been made, and the directions contained in it, and a demand of the said amount payable to Burns.

On the 9th February, 1867, Mr. McMillan, the attorney for Burns served Potter with a copy of the rule making the deed of reference a rule of court of the award, and of the power of attorney from Burns to his attorney to receive money, &c., and as was stated in the affidavit of such attorney, he at same time demanded from Potter the amount awarded, though, as was alleged by Potter afterwards, no explanation as to the facts, &c., was given, nor was a proper or sufficient demand made. Immediately after this, Potter tendered to Burns' attorney the sum of $40 57, but, as he refused

to pay a further sum demanded as the costs of making deed of reference a rule of court, the amount was not received

A. C. Chadwick obtained a rule calling upon Potter to shew cause why he should not pay to Burns the amount awarded, with costs, or, in default why judgment should not be entered against him.

W. Sydney Smith shewed cause, and contended that the service of notice and demand on the attorney was insufficient, and that the subsequent alleged demand and notice, of the 9th February, could not under the award be relied on. He filed affidavits of Potter and others, and one of Mr Drew, as follows:

"That I was, some time in the month of December last past, served with the notice annexed, by Alexander Grey McMillan, attorney-at-law.

That I did not take any notice whatever of such service, nor did I inform the said David M. Potter thereof, as I did not consider I was in any way bound to do so, as the said David M. Potter lives within a very short distance from the office of the said Alexander Grey McMillan, and could at any time have been served with such papers as were necessary to serve upon him; and further, I have never considered myself to be the attorney of the said David M. Potter in this matter, to receive service of papers herein, nor in any way to act for him in this matter, except to attend before the arbitrator as his agent upon the taking of evidence herein.

3 That the said Burns and McMillan were well aware that I never considered myself to be such attorney; for when they called upon me to sign the consent to enlarge the time for the arbitrator to make his award, I distinctly refused so to do, and stated at the same time that the reason why I so refused was because I did not consider myself to be the attorney for the said Potter in this matter; and that in consequence of such refusal, the said Potter was called upon, and his personal signature was obtained thereto

That when the said notice was served upon me I informed the said McMillan that, in my opinion, the proper way of notifying the said David M. Potter of the arbitrators' award in this matter would be by giving him a copy of the said award.

That the said McMillan was not the attorney for the said Burns, in the County Court suit named in the indenture of submission and arbitrators' award in this matter, — Adam Scott Gillespie, who at the time of the commencement of said suit resided in the said village of Elora, having been his attorney in such suit; and I never had, as the attorney for the said Potter, any notice of the said Burns having changed his attorney.

That the said Alexander Grey McMillan never produced to me any authority from the said Burns to demand and receive the moneys mentioned in the said award in this matter to be paid by the said Potter to the said Burns, nor am I aware that he ever had any such authority."

Chadwick contra, relied upon *Rothwell* v. *Timbrel*, 6 Jur. 691, and *Hawkins* v. *Benton*, 2 D. & L. 465.

Hagarty, J.—The award is clear that the sum awarded is not payable until ten days after notice of the award. The notice given was to Mr. Drew, who had acted for Potter in the matter of the reference, but it seems that gentleman had previously declined to sign a consent to enlargement, referring the parties to his client, who signed personally.

It is clear that when, under the old practice, an attachment was intended, all the services had to be personal. In 2 Archbold's Practice, 1596 (Edition of 1856), it says, "the same formalities as to personal service of copy of award for and demand of performance are in general required as when an attachment is sued for. A personal demand of the money may be dispensed with when the party is evidently keeping out of the way to avoid the same." Same language in 12th edition, 1700. *Winwood* v. *Hoult*, 14 M. & W. 197, and a later case, *Smith* v. *Troupe*, 7 C. B. 763, seem to point to the same issue. *Hawkins* v. *Benton*, 2 D. & L. 466, is express, the defendant was not served, he was an attorney, and his London agent had applied for copy of award, which was sent to defendant's address in the country. See also Russell on Awards, 615, 616 (Edition of 1864).

In the case before us, Mr. Drew disclaims all right to represent Potter, and the latter swears he had no notice of the award or of the amount payable by him thereunder, until he was served with the rule of court, &c.

Under these circumstances, I cannot hold that the proceedings taken are sufficient. I think that due notice was not given prior to serving the rule, and that Potter has been improperly called on to show cause. He seems to have been ready and willing to pay the amount when required, and I do not see how I can refuse giving him his costs.

Rule discharged with costs.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, *Esq., Barrister-at-Law and Reporter in Chambers.*)

In the matter of a suit in the Sixth Division Court of the County of Wentworth, between Walter Bradshaw, plaintiff, and Edward Duffy, defendant.

Prohibition—Jurisdiction of Division Courts—Title to land. —Fences.

A., intending to make a line fence between his land and that of B., by mistake made the fence on B.'s land. Afterwards, a correct line having been run, it was agreed that A. & B. should each make a portion of the fence on the correct line. B., in making his share, used the rails of the old fence made by A. A sued B. in the Division Court for the price of the rails so used, and the judge having decided in his favour, B. applied for a prohibition, but *held*, that the judge had jurisdiction.

[Chambers. February 7, 1867.]

An action was brought in the Sixth Division Court for the county of Wentworth, for $28, being amount awarded by Peter McLagan, Edmund Smith, and Eliza Mann, fence viewers of the township of Ancaster, as payable by said defendant to said plaintiff for share of line fence and rails between lots 33 and 34 of the 4th concession of said township.

The case was tried before his Honor Judge Logie, at Ancaster, and evidence given before him in substance as follows:

That the plaintiff had put up a line fence

many years ago on what was supposed to be the line between his lot and an adjoining lot, which was subsequently purchased by Duffy, the defendant. Some time after the defendant had purchased the adjoining lot, he got a surveyor to run the line between him and the plaintiff, and the surveyor, in running this line, took in a triangular piece of land from the plaintiff, of which he had been in possession. In order to save litigation, the parties entered into an agreement to run the division line through the middle of the triangular piece of land, dividing it equally between them Fence viewers were got to determine the portion of the fence which each party should erect and maintain, and each party erected his part of the fence on the line agreed upon. In doing so, Duffy, the defendant, used the rails of the fence which had been originally erected and maintained by Bradshaw, the plaintiff, but which fence by the agreement was upon the land taken in by the defendant. The plaintiff brought the suit for the value of the rails so taken by the defendant.

The learned judge reserved his judgment, which he subsequently gave in writing, in favor of the plaintiff, as follows:

"It is no doubt the case that, in general, erections put upon lands by a person not the owner cannot be removed, but become the property of the owner, as forming part of the freehold, and probably a fence would be considered part of the freehold. The law is however modified in favor of those who, in consequence of an unskilful survey, have made improvements upon lands as their own which, on a correct survey being made, turn out to belong to a neighbour. Section 53 of chapter 93 of the Consolidated Statutes for Upper Canada provides that, in such cases, the owner of the land, in an action of ejectment, shall not recover possession until he pays for the improvements, the value of which are to be assessed by the jury

It has been held, in *Campbell* v. *Fergusson*, 4 U. C. C P 414, recognized in *Hutton* v. *Trotter*, 16 U. C. C. P. 367, and *Morton* v. *Lewis*, 16 U. C. C. P. 485, that the act applies to private surveys made on the defendant's own account, as well as to public surveys; and in the last named case, *Morton* v. *Lewis*, it was held that fences were improvements within the meaning of the act

In this case, supposing that no agreement had been made between these parties about the land, and that Duffy had brought an action of ejectment for the land, Bradshaw would have had a right under the statute to assess against Duffy the value of his improvements, including the value of the fences; and Duffy would have had to pay for the improvements before he could recover possession, and Bradshaw ought not to be placed in a worse position in consequence of the agreement settling the line, than he would have been in if an action of ejectment had been brought against him. I think, both legally and equitably, the plaintiff in this suit is entitled to recover for the value of the rails, which originally belonged to him, and which defendant used in the erection of his part of the fence. But I cannot allow him for old rails what new ones (which it may reasonably be expected would last much longer) would cost."

On the 28th January last, *O'Reilly*, Q C., obtained a summons calling on the plaintiff, Bradshaw, and the Judge of the County Court of the County of Wentworth, to shew cause why a writ of prohibition should not issue to prohibit all proceedings in this matter, and upon an order for payment made by the said Judge of the County Court of the County of Wentworth, presiding in the Division Court, on the ground that the said judge had no jurisdiction to try or adjudicate upon the matters tried and adjudicated upon by him in the said suit in the said Division Court.

Spencer showed cause, and objected that the summons did not state the grounds upon which the application was made with sufficient particularity That the title to lands did not come in question, the contention simply being whether a Judge of a Division Court could adjudicate upon the question, fixture or no fixture If he can, and there is no doubt that he can, he had jurisdiction in this case, and there can be no prohibition The question is as to the ownership of the rails, not of the land Rails cannot, under the circumstances of this case, be considered as part of the realty

O'Reilly, Q C —The summons is sufficient, and want of jurisdiction may be shown by affidavit. (This point was not pressed by the other side, the learned judge being against the objection)

Fences are a part of the realty and go with the land, and the judge had no jurisdiction to try a case where the title to land came in question.—*Elwes* v *Maw*, 3 East 38; *Thresher* v *E. London Waterworks Co.* 2 B. & C 609; *Steward* v. *Lombe*, 1 B & B. 506; *Colgrave* v. *Dios antos*, 2 B. & C. 76; *Bunnell* v. *Tupper*, 10 U. C Q B. 414; Amos & Ferrard on Fixtures, 9, 13

Even if the judge had power to decide as to whether the fence was or was not a fixture, he could not by deciding that question wrongfully thereby give himself jurisdiction, when in truth he had no jurisdiction. The equities of the case are with Duffy, who for the sake of a settlement gave up a strip of his land.

Hagarty, J —I am of opinion that I should not order a prohibition in this case, or interfere with the decision of the learned judge I am not dissatisfied with his view of the facts; and with the powers vested in him by the statute. I cannot say he has decided erroneously. When the fence-viewers awarded that Duffy should maintain a specified portion of the boundary fence, and to do that he took away the rails formerly furnished by Bradshaw, to maintain what used to be a division fence on land now discovered to be Duffy's, I cannot say it was beyond the learned judge's power to decide that such rails so removed from the freehold to which they were perhaps in a manner annexed, should not be paid for by Duffy when used by him to erect the new fence, which he was bound by the award to maintain. They were originally Bradshaw's property, and put there for a special purpose, not to become part of Duffy's freehold in any view of the parties By the new survey and agreement, that fence ceased to answer the intended purpose, and a new fence is to be erected instead Duffy is bound to maintain part of the new fence, and he takes up these rails and uses them to fulfil his obligation.

I think Duffy must pay the costs of the parties whom he has unnecessarily brought here.

The Queen v. Mosier.

Habeas Corpus—29, 30, *Vic. cap.* 45—*Revisory powers of judges of Superior Courts over decisions of magistrates*—*Jurisdiction of Police Magistrates.*

The 29 & 30 Vic., cap. 45, had in view and recognized the right of every man committed on a criminal charge to have the opinion of a judge of Superior Court upon the cause of his commitment by an inferior jurisdiction

The judges of the Superior Courts are bound, when a prisoner is brought before them under that statute, to examine the proceedings and evidence anterior to the warrant of commitment, and to discharge him if there does not appear sufficient cause for his detention.

The evidence in this case warranted the magistrate in requiring bail.

Police Magistrates have jurisdiction both in cities and counties.

[Chambers, March 4, 1867.]

D. B. Read, Q. C., obtained a writ of *habeas corpus* to bring up the body of one John Mosier who was a prisoner in the common jail of the county of York, charged with an assault on Dr. Hunter, of Newmarket, with intent to do him grievous bodily harm; and on the same day he obtained a writ of *certiorari*, directed to Alexander McNabb, police magistrate for the city of Toronto, to send up the proceedings had before him, upon which the warrant to commit the prisoner had been founded.

On the return of these writs, the evidence taken before the police magistrate at Newmarket was produced and read, from which it appeared—

That the municipal election for the village of Newmarket was to be held on Monday, the 7th January, 1867, and that Dr. Hunter was one of the candidates; that he had made arrangements to go with a Mr. Atkinson to Queensville to see a man by the name of Stiles, but on Sunday night, the 6th of January, it was arranged in the presence of Mr. Campbell, Mr. Bridge and Mr. McMaster, at Dr. Hunter's own suggestion, that he should take Mr. McMaster's horse and cutter and drive himself to Queensville, instead of going with Mr. Atkinson, as had been arranged the evening before. Although Dr. Hunter does not remember Mosier's name being then mentioned, he said it was tacitly understood that Mosier, who was Mr. McMaster's agent, was to call him early, and although no hour was named, he seems to think it was to have been at 5 o'clock. At 5 o'clock there was a noise heard at Dr. Hunter's door, which awakened him. He got up and found it was Mosier, who came in and said he came to awaken him—that he was afraid he would oversleep himself. Dr Hunter asked him to stop and get some breakfast, but he said that he would go and get the horse and cutter ready. He remained some time—five or ten minutes. The arrangement was that he was not to return, and Dr. Hunter was to go down to Mr. McMaster's; it was five or six hundred yards from his house. Dr. Hunter got breakfast and asked the girl what time it was, and he was told it was half-past five. He then got up and put on his overcoat and overshoes and muffler. About 25 minutes to six o'clock Dr. Hunter left his house on Timothy street to go to Mr. McMaster's house on Main street, and took the direct road to it. Timothy street goes into Main street at right angles. As Dr. Hunter left his house he saw some one to his right on Timothy street, two or three rods from him, but who was behind him. When he went towards Main street he heard his steps on the snow behind him, and partially turned round and saw the man, and he heard him following him. When about half-way down to Main street he heard as if some one was walking behind him. And he got a violent blow as if a sudden concussion, and this is all he remembers. He was deprived of consciousness. He had been walking slowly, expecting the person to come up. It flashed through his mind it was perhaps Mosier waiting for him, but he did not form this opinion from his form or appearance. When the person following him did not overtake him, he thought that it was Mosier, but he did not turn far enough round to see who struck him, but before he was struck, and just as he was turning round to see who was following him, the thought occurred to him that it was Mosier. As far as he can tell he was struck one blow. The blow was on the upper part of the spine. He could not say how long it was till he became conscious. His first recollection was hearing the 6 o'clock bell ring. He was lying on his face and side; no one near. He could not rise, and his tongue was partially paralyzed from the effect of the blow. He called as loud as he could, and one Dennis came up, and then went and brought Mr. Landy, who took him home, where he was confined to bed for five or six days, but his neck and spine were painful for fourteen days. No one, he says, knew that he was to be out at that particular time but his servant girl and Mosier. On his cross-examination he said he did not say it was Mosier who struck him, or that he had any motive for assaulting him. All his knowledge of him would lead him to believe that he was his friend, but he says he accused Mosier of apathy at the election in January last. He thought he ought to have influenced his brothers-in-law, one of whom was strong against him, and he says distinctly there was no arrangement that Mosier was to come back for him.

William McMaster said he was the person referred to by last witness (Dr. Hunter). Mosier did not know from him of any arrangement with Hunter to lend him his horse and cutter to go to Queensville. Mosier does not live at his place, as he is married. McMaster undertook to wake Hunter on Monday morning. On Monday morning Mosier woke witness by throwing snow on his window, and when he found it was Mosier he told him to come up to his room. He had directed Mosier to waken him on Monday morning at five o'clock, but gave him no reason, but thinks he had told Mosier to waken him; that he had arranged with Hunter to go to Queensville with his horse and cutter. He looked at his watch when Mosier wakened him, and it was about five o'clock. He heard Mosier go out to the street after he got his instructions, and in about fifteen or twenty minutes he saw Mosier return into his yard. He looked through the window and recognized him, and did not see him after this till six o'clock, but heard him moving the sleigh in the yard. He heard him after this go out of the yard and go up the street, and he had only been gone a few minutes when he heard him running like as for his life. He ran into the yard and up into wit-

ness' bedroom without slacking his speed. It was about twenty or thirty minutes after he came in before he went out again This was the time that he went out after he had returned from waking Hunter. Witness asked Mosier what was the matter? He replied to hurry and come down and he would tell; he said tell him then; and he then said Dr. Hunter had been nearly killed dead; some one had attacked him. He told Mosier to go and waken Dr. Hunter, and then to go and get the horse and cutter to go to Queensville. McMaster, when he went down stairs after hearing of Dr. Hunter's being beaten, found Landy, Atkinson and Mosier down stairs. He does not remember looking at his watch, but it was almost daylight. When he got to Dr. Hunter's the lamp was lighted. On his cross-examination he said that if Mosier had gone out in the ordinary way he would have heard him He did hear some noise in the yard, and thought it was Mosier attending to his work. When he saw Dr. Hunter at his own house he was lying on the sofa and seemed unconscious. On his re-examination he said it was between seven and half-past seven when he saw Mosier ready with the horse to go out.

John Dennis said he remembered the 7th January. He saw Dr. Hunter about fifteen or twenty minutes past six that morning He was lying about five or six rods from his own door. He had gone to Dr Hunter's to enquire for him, and was told he had gone to McMaster's half an hour before. He then went towards McMaster's, but while yet on the steps of Dr. Hunter's house heard dismal groans, and when he came down the steps he saw a black object lying on the snow. He turned him over and saw it was Dr. Hunter lying on his face. He was bleeding from the mouth and nose. He attempted to raise him but could not, and then ran to his house for Mr. Landy and went to call Mr. Allen, and came back when Landy came out, and they went and carried the Dr. to his own house, with difficulty. The Dr. appeared to drag his feet as if trying to walk. He was unable to walk and they carried him to his house. He complained of being badly hurt somewhere about the back of the neck. He soon after returned to his own house, which is the same side of the street as Dr Hunter's, but west of it and further from Main street. Landry went in for a minute, as he was not quite dressed. They then went to McMaster's, and they met Atkinson and then Mosier. It was not more than twenty minutes from the time they first saw Dr. Hunter on the sidewalk till they got to McMaster's house, where they stayed not more than five or ten minutes.

On his cross-examination he says when they met Mosier they told him what had happened to Dr. Hunter, and he seemed to be very much surprised, as much as any one could be who had not heard it

McMaster, on his being recalled, says he judged it to be from twenty to thirty minutes after Mosier returned from waking Dr. Hunter that he went out the second time, and it was about fifteen or twenty minutes from the time he wakened Dr. Hunter until he returned. He says he thinks it was after the ringing of the town bells that Mosier went out the second time. He says he is tolerably sure it was after the ringing of the bells that Mosier went out the second time.

Landy corroborated the statement of Dennis. He thinks it was twenty minutes past six when they got to McMaster's after taking the Dr in and he thought from what he saw that Hunter's life was in danger, and he says they met Mosier and told him about their finding Dr. Hunter and carrying him to his house.

James Allen says that John Dennis came to his house, knocking at the door, and he asked me to come out quick; that Dr. Hunter was killed. Dennis then left, and he went into his room to put on his clothes, but before he had finished Dennis came again and called me to come quickly, and he went to Dr. Hunter, and saw the Dr. there.

D. B. Read, Q. C., (*Harrison* with him) on behalf of the prisoner, after reading the evidence, contended that the proceedings and examinations had taken place in the county of York, but that the warrant had been issued in the city of Toronto. That, under the provisions of the statute 29 & 30 Vict. cap. 45, the judges of the superior courts had a revisory power given to them, and were bound to examine the proceedings, "and to the end that the sufficiency thereof to warrant such confinement or constraint may be determined by such judge or court." That upon such examination it would appear that there was no evidence against the prisoner to warrant his commitment, and that he ought to be discharged.

D. McMichael, for the crown, argued that the return showed that the magistrate had ordered that the prisoner should enter into his own recognizance for $500 to appear at the next Assizes to be held in and for the county of York, on the 8th day of April next, to answer to any indictment which might be then and there preferred against him, which he had refused, but asked to be committed to the next court of competent jurisdiction, on bail, and was therefore committed. That the prisoner had now all that he was entitled to have, for the statute only authorized the judge to bail the prisoner, not to discharge him. That the 5th section of this act was only in furtherance of the 3rd section and gave no revisory or other power greater than it conferred That it was not the intention of the legislature to make a judge in chambers a court of review from the proceedings of magistrates That this intention, and the construction he put upon the 3rd and 5th sections was to be inferred from the fact that the statute gave an appeal from the court into which the proceedings were to be returned by the judge to the Court of Appeal, but did not give it from the decision of a single judge. That the duty of justices of the peace was pointed out in the Con Stat. C cap. 102, sec 57; and he is authorized to determine, upon the evidence, whether the accused shall be committed for trial, bailed or discharged That the judge ought not to interfere with his decision. That the power of this police magistrate to deal with this question was clear from ss 357 360 of the 29 & 30 Vic. cap. 51. He was *ex officio* a justice of the peace for the whole county, and could issue any warrant or try and investigate any offence in a city when the offence has been committed in the county in which such city lies, or which it adjoins.

J. Wilson, J.—On the question of jurisdiction it is clear, from s. 357 of the 29 & 30 Vic. c. 51, that the police magistrate is *ex officio* a justice of the peace in and for the county of York; and, by s. 360, a justice of the peace for a county in which a city is may try and investigate any case in a city, when the offence has been committed in the county or union of counties in which such city lies, or which such city adjoins. The police magistrate had therefore jurisdiction, &c, both in the county and city, and the proceedings are legal in this respect.

Our late statute 29 & 30 Vic. cap. 45, is chiefly taken from the imperial statute 56 Geo. III. cap. 100, but the 5th section is new. Writs of *certiorari* had in practice been issued in vacation by order of judges in chambers in this province previous to the passing of this act, but the learned Chief Justice, in the case of *The Queen* v *Burley*, 1 U. C. L. J. N S 34, for extradition, doubted the power of judges to order these writs in vacation, and it was proper that all doubts should be removed respecting this practice. In that same case it was intimated that, in the opinion of some of the judges, every man committed on a criminal charge had the right to have the opinion of one of the Superior Court judges pass upon the cause of his commitment by an inferior jurisdiction.

In my view of this clause it had reference to both these opinions. Before this act was passed, when by the return of the *habeas corpus* and the proceedings upon which a prisoner stood committed, it appeared that the commitment was illegal, it had been the practice for judges in chambers to discharge him.

It is true that the power to determine upon the sufficiency of the proceedings to warrant such confinement is not given in direct words, but it is certainly by the plain st implication. The *habeas corpus* and its return show the immediate cause of the detention, which may on its face be all right, but section 5 of the act goes further, and authorizes the issue of a writ of certiorari for the production before the judge of all and singular the evidence, depositions, convictions, and all proceedings had or taken touching or concerning such confinement or restraint of liberty. Why? "To the end that the same may be viewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined by such judge or court."

The third section of the act has reference to the truth of the facts stated in the return to a writ of *habeas corpus*. Before the 59 Geo. III. there was no way of enquiring into the truth of the facts as stated in the return. They might be good as stated but untrue in fact. It was so here until last year, but with no practically bad result, for we have had no case in which a false return has been suggested. Now, the truth of the facts in the return law can be enquired into in the m nner pointed out by the 3rd section. I do not, however, see, as has been contended for here, how the fifth section is to be construed as referring to this, or in aid of it only. It appears to me that it has a different object to the one which has been already mentioned.

Adopting the views expressed, I cannot help holding that a judge is bound to the examine proceedings anterior to the warrant, to see that they authorize it, and if they do not that he is bound to determine whether they warrant the detention, and if not to discharge him

In this case the prisoner is so far in voluntary custody, for all he was required to do was to enter into his own recognizance. He refused and was committed. I find him in prison, and so entitled to the benefit of the act, in strict right.

By stat. 22 Vic. cap. 102, s. 57, when all the evidence upon the part of the prosecution against the accused has been heard, if the justice be of opinion that it is not sufficient to put the accused party upon his trial for any indictacle offence, he shall forthwith order him to be discharged as to the information then under enquiry; but if in the opinion of the justice the evidence is sufficient to put the accused party upon his trial for an indictable offence, although it may not raise such a strong presumption of guilt as would induce such justice to commit the accused for trial without bail, &c., then such justice shall admit the party to bail, &c In this respect the police magistrate has complied with the provisions of the statute. He did not think it was a case where the presumption of guilt was so strong as to induce him to commit the prisoner for trial without bail, but still a case for which he thought bail ought to be required.

I agree with the police magistrate that it was a case which justified him in requiring bail.

CHANCERY CHAMBERS.

(*Reported by* Mr. Charles Moss, *Student-at-Law.*)

Aikins v. Nelson.

Notice of motion—Endorsement on of name and place of business of Solicitor by whom given—Leave to amend.

[Chambers, January 11, 1867.]

This was an application to open the biddings, made at the sale of lands in this suit.

It was objected that the notice of motion was not endorsed with the name and place of business of the solicitor by whom it was served, in accordance with order 43, sec. 2, and, this being the first proceeding in the cause on the part of the applicant, order 32 of the orders of Sept 10, 1866, did not apply.

The Judges' Secretary considered the objection good, but gave leave to amend the notice of motion and bring on the application again forthwith, upon payment of costs. See *Rice* v. *Webb*, 2 Hare, 511; *Hill* v. *Maguire*, V. C. Esten, February, 1862.

Re Jackes.

Land belonging to infants—Renewal of lease of—12 Vic. cap. 72—Imp. Act 11 Geo. IV. and 1 Wm. IV. cap. 65, sec. 16.

The Court of Chancery can act, in selling or leasing infants' estates, under the stat. 12 Vic. cap. 72, only when it "is of opinion that a sale, lease, or other disposition of the same, or any part thereof, is necessary or proper for the maintenance or education of the infant, or that by reason of any part of the property being exposed to waste, &c., his interest requires or will be substantially promoted by such disposition."

Upon a petition, styled in the matter of the infant and in the matter of 12 Vic. cap. 72, and 29 Vic. cap. 28, for the

sanction of the court to a renewal of a lease made by the infant's ancestor and containing a covenant for renewal, *Held*, that none of the circumstances being alleged under which the court is empowered by the statute to act, the court had no authority to make any order.

Semble, the court has authority under Imp. act 11 Geo. IV. and 1 Wm. IV. cap. 65, sec. 16, to sanction such a lease, but the lease must be produced to the court, in order that it may judge of the propriety of its terms.

[Chambers, January 16, 1867.]

G. Murray presented a petition in the matter of the above named infants, and in the matter of 12 Vic. cap. 72, and 29 Vic. cap. 28, setting forth that the infants were seized of certain lands, which had been leased by their ancestor for twenty-one years, with a covenant for renewal for a further term of twenty-one years; that the lessor, their ancestor, had died intestate; that the term granted by the first lease had now expired, and praying the sanction of the court to a renewal lease in accordance with the covenant therefor, and the appointment of a guardian to the infant heirs, to execute the same on their behalf.

The Judges' Secretary.—This is not a case for applying under the 12 Vic. cap. 72. This court can act under that statute, and sanction sales or leases of an infant's estates only when it "is of opinion that a sale, lease, or other disposition of the same, or of any part thereof, is necessary or proper for the maintenance or education of the infant, or that by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such dispositions," and none of those circumstances are alleged to exist in the present instance. Nor has the act 29 Vic. cap. 28, any bearing on the subject.

Under the Imp. act 11 Geo. IV. and 1 Wm. IV. cap. 65, sec. 16, the Court of Chancery has power, "where any person, being under the age of twenty-one years, might, in pursuance of any covenant, if not under disability, be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any number or term of years absolutely, or determinable on the death of one or more person or persons," to authorise such infant, or his guardian, by an order, "to be made in a summary way, upon the petition of such infant, or his guardian, or of any person entitled to such renewal, from time to time to accept a surrender of such lease, and to make and execute a new lease of the premises comprised in such lease." (McPherson on Infants, pages 313 and 314) and this act is in force here. On the petition being amended, and styled in the matter of the infants and of this statute, an order may be made; but the proposed lease must be submitted, that the court may judge whether its terms are proper.

Gault v. Spencer.

Security for costs—Plaintiffs out of jurisdiction possessed of real property within.

A plaintiff, who is resident out of the jurisdiction, will not be ordered to give security for costs if he is possessed of unencumbered real estate of sufficient value, situate within the jurisdiction.

[Chambers, January 26, 1867.]

Moss moved on notice for an order setting aside two orders for security for costs obtained on præcipe by the defendants, it appearing by the bill that the plaintiffs were resident out of the jurisdiction. He read affidavits showing that the plaintiffs were the owners of unencumbered real estate of the value of $800, situate within the jurisdiction, and cited *White* v. *White*, Ch. R. 48.

Spencer contra, cited *Lillie* v. *Lillie*, 2 M. & K. 404; *Lord Lucan* v. *Latouche*, 1 Hogan. 448; *Lord Auldborough* v. *Burton*, 2 M. & K. 401.

Smart, for defendant Ketchum, cited *Marsh* v. *Beard*, Ch. R. 390; and *Harvey* v. *Smith*, Ch. R. 392.

The Judges' Secretary, after consideration, granted the order setting aside the orders for security for costs. Costs of the application to be costs in the cause.

ENGLISH REPORTS.

Mitchell v. Lee.

Attachment—Rent—Prejudice of collateral securities—Common Law Procedure Act, 1854.

A debt may be attached under the Common Law Procedure Acts, although there may be collateral remedies for its recovery, which are extinguished or kept in abeyance during the attachment.

[Q. B., Jan. 17, 1867.]

This was an interpleader under the following circumstances:—

The plaintiff, a judgment creditor, obtained an order calling on a tenant of the judgment debtor to appear and show cause why he should not pay to the plaintiff the rent due to the judgment debtor.

The present defendant, who was a mortgagee of the property, gave notice to the tenant to pay the rent to him, and now applied to set aside the order.

Tomlinson for the defendant.—This case is not within the 61st section of the Common Law Procedure Act, 1854, which contemplates ordinary debts and not rents. The remedy against the garnishee was not intended to interfere with the ordinary relation of landlord and tenant, for in such case the rent is not only recoverable by an action for use and occupation, but there is also the right of the lord to distrain, which may be prejudiced by being suspended. In cases of collateral remedies for debts these would not be transferred and must be either extinguished or held in abeyance while the debt is bound. Nothing can be attached that the judgment creditor cannot hold as beneficially as the judgment debtor: *Newman* v. *Rook*, 4 C. B. N. S. 434, per Willes, J., "the operation of the statute is to give the judgment creditor the same rights exactly as the judgment debtor himself had." All the authorities show that rent is not attachable by the custom of London, to which this Act was assimilated. Com. Dig. tit. Attachment D; Locke's Practice of Foreign Attachment, p. 40; Brandon's Law of Foreign Attachment, p 35.

Manisty, Q. C., for the plaintiff, *contra*.

Cockburn, C. J.—Though it may be hard on a person who has a collateral security for a debt that his power of enforcing it should be lost while the debt is tied up, the language of the Act is too strong to allow us to take into considera-

tion such a result in construing the words used. The Act says that "All debts owing from the garnishee to the judgment debtor may be attached, and this is a debt, although the landlord has also, in addition to his right of action, certain summary and extraordinary remedies. Possibly it may be inconvenient that he should be prevented from putting them in force, but we cannot consider this in our interpretation of the Act.

BLACKBURN, J.—I am of the same opinion. Mr. Tomlinson has been unable to shew any specific lien or claim on these sums of money, so as to bring the case within the 29th section of the Common Law Procedure Act, 1860; and therefore, as far as that point is concerned, his client must be barred. Besides this, the objection is raised, that such a proceeding does not apply to rent on the ground that there is in such a case a collateral remedy for its recovery by distress. No doubt inconvenience may arise, not only in this case but in others, such as a warrant of attorney to sign judgment. In this and similar instances, there is a collateral remedy which is not transferred, but only suspended, and inconvenience may arise from such remedy being suspended, but all we have to consider is the working of the Act, and that, I quite agree, embraces the present case.

MELLOR and LUSH, J. J., concurred.

Rule absolute, the claim to be barred and execution to issue against the garnishee.

GLADMAN v. JOHNSON.

Dangerous animal—Scienter—Evidence—Knowledge of husband inferred from notice to wife.

The plaintiff was bitten by a dog belonging to the defendant; the dog had, four years before, bitten a boy, and, on another occasion, torn a person's dress. These facts were communicated by the aunt of the boy bitten to the defendant's wife, on the defendant's premises, but there was no evidence that the wife had communicated them to her husband.

Held, that there was some evidence from which a jury might infer that the defendant knew of the savage nature of the dog.

[C. P., Jan. 11, 1867.]

Declaration.—For wrongfully keeping a savage dog, which bit the plaintiff, knowing the same to be of a fierce and savage nature.

Pleas.—1. Not guilty.

2. That the dog was properly secured in a place where the plaintiff had no right to go; that the plaintiff was trespassing and came within reach of the dog; and that the injury complained of was occasioned by the negligence of the plaintiff.

Joinder of issue.

The cause was tried before Smith, J., when it appeared that the defendant occupied premises which consisted of a house fronting the road, at the back of which was a yard, where there were some sheds and outbuildings. He carried on the business of a dairyman in the house, which was ordinarily entered by his customers through a door fronting the road. The defendant carried on the business of a corn-dealer in the yard at the back of the house, and the entrance to the yard was from a lane at right angles to the main road.

The plaintiff had been in the habit of purchasing milk at the defendant's shop, and went to the shop one Sunday morning. He attempted to enter the shop by the front door, but finding it locked, he went through the yard to the back door. As he was leaving the house and crossing the yard, a dog belonging to the defendant flew at him and bit him, and did the injuries complained of.

The defendant's wife assisted the defendant in the management of the milk business.

It was proved that, four years before this accident happened the same dog had bitten a boy named Gibson, and on that occasion Gibson's aunt went to the defendant's premises and gave an account of the accident to the defendant's wife. The defendant's wife denied that any such communication had ever been made to her.

It was objected by the counsel for the defendant that the communication could not be taken to have been made to the defendant, and that there was no evidence to prove the scienter. It was also proved that on another occasion the dog had torn a person's dress.

The learned judge thereupon nonsuited the plaintiff, with leave to him to move for a rule to enter the verdict for £15 (the damages agreed upon) if the Court should be of opinion that there was any evidence from which the jury could infer that the defendant was aware of the savage nature of the dog.

On a former day.

Prentice, *Q. C.*, had obtained a rule accordingly.

T. Jones, *Q. C.*, now showed cause, and contended that notice to the wife of what had taken place was not notice to the husband; that the Court could not infer that she had communicated what she had been told to her husband. If a person had stated to the defendant's wife that he served a writ on the defendant, that would not be evidence that the defendant knew that the writ had been served. Nor could the defendant's wife have been asked whether she communicated this statement to the defendant: 16 & 17 Vict. c. 83, s. 3; *O'Connor* v. *Majoribanks*, 4 M. & G. 435. It must also be shown that the defendant knew that the dog was accustomed to bite mankind: *Thomas* v. *Morgan*, 2 Cr. M. & R. 496. Here the evidence only refers to two cases. [WILLES, J.—The plaintiff need only show that the dog indicated an intention to bite.]

Prentice, *Q. C.*, in support of the rule.—There was some evidence that the defendant was aware of the savage nature of the dog; notice to the wife is always sufficient. The case is governed by the case of *Stiles* v. *The Cardiff Steam Navigation Company*, 12 W. R. 1080, 33 L. J. Q. B. 310.

BOVILL, C.J.—I am not prepared to assent to the proposition put forward by Mr. Prentice, that notice to the wife would in all cases be sufficient. Here the wife attended to the milk business; the dog was kept in the yard, when Gibson was bitten by the dog on a former occasion his aunt went to the defendant's premises in order to make a complaint to the defendant; the defendant's wife appeared, and the formal complaint was made to lie; it was contended that that complaint should have been communicated to the defendant; but I think that there was evidence from which a jury might have inferred that that complaint had been communicated to the defendant, and that the scienter was proved.

Willes, J.—I am of the same opinion. If I had had to try this case, I should have taken the same course as that taken by the learned judge at the trial. There was some slight evidence to show the ferocious character of the dog, and that the defendant was aware of that character. I think the verdict must be entered for the plaintiff The dog had bitten one person before, and had torn the dress of another; those are the facts; and that is some evidence that the dog was accustomed to bite mankind. Then was there any evidence of the defendant's knowledge? the aunt of the boy who was bitten saw the defendant's wife, at the defendant's house, and communicated the facts to her, the wife in the absence of the husband was the proper person to lock up the dog. That complaint was delivered in the character of a message, and it was the duty of the wife to make known to her husband the circumstances of the case. I cannot say that there was no evidence to prove the scienter, and therefore the rule to enter the verdict for the defendant must be made absolute.

Keating, J.—I am of the same opinion. The evidence was very slight, so slight that it appeared to my brother Smith that it ought to be withheld; there was some evidence, and therefore the rule must be made absolute

Smith, J.—I am glad that the Court can come to the conclusion that there was evidence; the only question is as to the defendant's knowledge of the savage nature of the dog. I regret that the law should make it necessary that that should be proved; but as that is the rule, I do not regret that its stringency should be to some extent mitigated. In my opinion there was some evidence from which the jury might infer that the scienter was proved.

Rule absolute.

Huffer v. Allen and Another.

Practice—Common Law Procedure Act, 1852, *s.* 27—*Payment before judgment—Estoppel.*

An action for maliciously and without reasonable or probable cause signing judgment for a larger sum than was due at the time when judgment was signed is not maintainable so long as the judgments has not been set aside.

[Ex., Nov. 14, 1866.]

Declaration.—That the plaintiff was indebted to the defendants in the sum of £28 0s 9d., that the defendants commenced an action against him by serving him with a writ specially indorsed for that amount; that before appearance was entered, and before judgment was signed the plaintiff paid to the defendants the sum of £10 on account of the said debt; that after such payment the defendants wrongfully and maliciously, and without any reasonable or probable cause, caused judgment to be signed against the plaintiff for default of appearance for the full amount of the debt of £28 0s. 9d. with costs, without giving credit for the sum of £10, and thereby the defendants wrongfully, and maliciously, and without any reasonable or probable cause, caused a judgment to be signed for a sum exceeding £20 exclusive of costs, and wrongfully and maliciously, and without any reasonable or probable cause, caused a writ of *ca. sa.* for the sum of £28 0s 9d and costs, to be issued, and the plaintiff to be arrested; to discharge himself from which arrest he was compelled to pay the sum of £35 19s. 3d.

To this count the defendants demurred.

2nd. count. That the defendants, by the judgment of the Court, recovered the sum of £28 0s. 9d., and £4 costs, making the sum of £32 0s. 9d., and that the plaintiff paid to the defendants the sum of £10 on account of the said debt and costs, and the defendants wrongfully and maliciously, and without reasonable or probable cause caused a writ of *ca. sa.* to be issued for the sum of £32 0s. 9d., and the plaintiff to be arrested; to discharge himself from which arrest he was compelled to pay the sum of £35 19s. 3d.

To this second count, the defendants pleaded a 7th plea, that the plaintiff was estopped from alleging the payment of the sum of £10, because such payment was made after action brought, and before judgment was signed, and that after such payment it was considered by the judgment of the said Court in the said action that the defendants should recover against the plaintiff the whole of the debt and costs, amounting to £32 0s. 9d.

To this 7th plea the plaintiff demurred, and replied that the judgment was obtained by fraud.

This replication was demurred to by the defendants; but the replication and the demurrer were withdrawn.

Hayes Serjt. (*Granthan* with him) for the defendants.—As the defendants recovered judgment for the whole debt subsequent to the payment of the sum of £10 by the plaintiff, he is estopped from averring the payment of such sum, or from denying that the whole amount was due. The course that he should have adopted was to have applied to have the judgment set aside, for, while the judgment stands uncontradicted, it shows conclusively between the parties that the whole debt of £28 0s 9d. was due.

Gilding v. *Eyre*, 9 W. R. 946, 31 L J. C. P. 174, 10 C. B. N. S. 592, is materially different from the present case, as there the payment was made after judgment was signed.

The plaintiff here might have appeared to the writ, and pleaded the payment of the £10, after the commencement of the action. [Kelly, C. B. —The plaintiff having failed to appear, judgment is signed, and properly signed, against him; you say then, that he cannot now come and complain of what has taken place, until he has, by due course of law, had the record corrected by the Court. The plaintiff is going against the established principle, that a judgment while it stands uncontradicted is conclusive.

Henry Matthews (*J. O. Griffiths* with him) for the plaintiff.—This action is maintainable. The judgment which is alleged in the first count, is an irregular judgment, and the plaintiff is therefore not estopped from disputing it. The judgment should have been signed only for the balance due, and not for the whole amount claimed: *Hodges* v. *Callaghan*, 5 W. R 532 2 C. B. N. S. 306, 26 L. J. C P. 171. Willes, J, there says, "The plaintiff ought to represent the Court as pronouncing judgment in his favour only for the sum which is really due to him." [Bramwell, B. — This is not an irregular judgment except in point of morality; that is to say, it is warranted by the proceedings by which it

has been obtained I understand Willes, J., to mean by "*ought*" that it was the plaintiff's moral duty to sign judgment only for the balance.] The judgment in this case was clearly signed without reasonable or probable cause, and maliciously [Bramwell, B.—The regularity or irregularity of the judgment does not depend on the *bona fides* or *mala fides* of the party signing it.] The plaintiff is, at all events, entitled to maintain this action to recover the £10. The law of estoppel is clearly subject to this qualification—that if some matter has either not been raised or not determined in a suit, the judgment, as far as that matter is concerned, does not act as an estoppel. The judgment in this case does not state whether the money was paid before judgment was signed, or whether credit ought not to have been given for it, and although the plaintiff is estopped as regards the payment of the sum of £28, he is not estopped from recovering the sum of £10; *Gilding* v. *Eyre*, 9 W. R. 946, 10 C. B. N. S. 592, 31 L. J. C. P. 174, is in point for the plaintiff. As the plaintiff cannot recover the £10 as money had and received (*De Medina* v. *Grove*, 10 Q. B. 152, 172, 15 L. J. Q. B. 287) he will be without a remedy unless he be allowed to maintain this action.

Hayes Serjt., was not called upon to reply.

Kelly, C.B.—I am of opinion that this action is not maintainable. I say so with great regret, for if the act done by the plaintiffs (the present defendants) was knowingly done, and if the time that they signed judgment for the whole debt of £28 0s. 9d., they were aware that the debt had been reduced from £28 0s. 9d. to £18 0s. 9d., their conduct was altogether unjustifiable. But we must decide according to the law of the case and the question for us here is whether a judgment which, in contemplation of law, is an act of the Court, does not estop either party from alleging a state of facts at variance with it.

The judgment of a Court of competent jurisdiction, to use the language of the old books, "imports incontrovertible verity" as to all the proceedings which it sets forth, and it is not competent, for either the plaintiff, or defendant, to introduce into it anything impeaching its accuracy.

I am of opinion that we are bound to act according to the well established principle which I have just mentioned, and that we must take the facts to be as stated in the judgment, which, in a manner not to be contraverted or impeached by either of the parties, says that the debt at the time of the signing of the judgment was £28 0s. 9d., and not £18 0s. 9d.

It has been urged by Mr. Matthews, that if we hold that the plaintiff is not entitled to maintain this action, he will be left without a remedy. That is not so. As soon as the plaintiff had ascertained that the judgment was signed for £28 0s. 9d., it was competent for him to apply either by motion to the Court, or by summons before a judge at chambers, to be let in to appear and defend, or to have the judgment set aside or reduced.

As he has failed to adopt such a proceeding, the judgment stands unaltered.

If the plaintiffs in the original action (the present defendants) or their attorney, well knowing that the £10 had been paid, had nevertheless signed judgment for the larger sum, and then proceeded to issue execution, I see no reason why the present plaintiff should not maintain an action against them after having the judgment reduced.

It is a necessary preliminary that he should do away with, and correct the judgment before he can maintain this action.

Bramwell, B.—I agree with what my Lord has stated, except in the regrets that he has expressed at the position of the present plaintiff, which is entirely owing to the course he has thought fit to pursue. It is quite clear that the plaintiff cannot attack any of the proceedings of the defendants unless he first attack the judgment. He should have gone before a judge at chambers and had the judgment set aside. Until that is done, it is contrary to all precedent and all principle to say that what it contains is erroneous. It is alleged by the plaintiff that the demurrer admits that the judgment was signed wrongfully, as it admits the payment of the £10. But that is not the case. The demurrer of the defendants is equivalent to their saying, "We decline to enter into the question with you while that judgment remains on the record unaltered, and until you attack it." I am not sure even whether the plaintiff would be entitled to have the judgment set aside, as in my opinion it is very questionable whether he ought not to have pleaded the payment of the £10. That question, however, is immaterial, and not in issue now, and it is unnecessary to decide it. On the broad principle that while the judgment remains as it does, it cannot be impeached by either party, I think that the demurrer must be allowed.

Channell and Pigott, B.B., concurred.

In re Oliver (a Solicitor)

Election agent—Taxation—Solicitor employed as Canvassing agent.

Where, for a Parliamentary election, a solicitor was employed as canvassing agent, other persons being employed as legal agents.

Held, that his bills were not liable to taxation.

[M. R., Jan. 22, 24, 1867.]

This was a motion to discharge an order for the taxation of a solicitor's bills.

Mr. Fenwick was a candidate for the representation in Parliament of the borough of Sunderland at the general election in the year 1865, and at the election in the year 1866. He employed two persons who were solicitors, as his legal agents, and had also district canvassing committees with agents at their head. The head agent of each district was a solicitor. Mr. Oliver, on whose behalf the present application was made, was duly retained as Mr. Fenwick's agent for one of the districts. Oliver had sent in some bills made out on the principle that he was employed as canvassing agent and not as solicitor, and had brought an action for the amount, and Mr. Fenwick had obtained an order for taxation, which stopped the legal proceedings. Persons not solicitors had been appointed to act with Oliver in his district.

Druce, Q C., applied to discharge the order for taxation. He contended that Oliver was not employed as solicitor, and the fact that his legal knowledge might be useful in his occupation of canvassing agent, did not make him a legal agent. He referred to *Allen* v. *Aldridge*, 5 Beav. 401; *Re Osborne*, 6 W. R. 401, 25 Beav 353.

C. Hall, for Fenwick, contended that besides the general legal agents each canvassing district had a legal agent at the head of it, and Oliver was one of these last.

Jan 24.—Lord Romilly, M R.—This order must be discharged. In the case of *Re Osborne* the retainer was for professional services Here that is not the case, and the fact that Oliver is a solicitor does not make his bills liable to taxation if, as appears here, he was employed in another capacity. This, however, is not a case in which it will be proper to give costs

DIGEST.

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(*Continued from page* 31.)

Equity Practice (*Continued*).

6. When a receiver appointed in a suit passes his accounts, and the same solicitor appears both for the receiver and the plaintiff, only one copy of the account can be allowed between them on taxation.—*Sharp* v. *Wright*, Law Rep. 1 Eq. 634.

7. A defendant to whom a decree has given the conduct of a sale will not be ordered to pay, if there are no funds in court, the costs of a purchaser discharged from his purchase on the ground of bad title.—*Mullins* v. *Hussey*, Law Rep. 1 Eq. 488.

See Appeal, 1; Declaration of Title; Equity Pleading, 3; Interrogatories, 5; Patent; Production of Documents; Substitutional Service; Vendor and Purchaser, 4.

Estoppel.—*See* Res adjudicata.

Evidence.

1. Entries of pedigree in a family Bible or Testament, produced from proper custody, are admissible in evidence, without proof of handwriting or authorship.—*Hubbard* v. *Lees*, Law Rep. 1 Ex. 255.

2. Certificates of births, baptisms, &c., are admissible in evidence, without proof of the identity of the persons mentioned with the persons as to whom the fact recorded is sought to be established.—*Hubbard* v. *Lees*, Law Rep. 1 Ex. 255.

See Bankruptcy, 11; Conviction; Marriage, 2; Parol Evidence; Production of Documents.

Executor.

1. A testator directed his debts to be paid and then gave all his personal estate to trustees, to get in as they deemed expedient, and divide the proceeds among his children, except some furniture, which he gave a daughter. *Held*, that the trustees were executors according to the tenor.—*Goods of Bayles*, Law Rep. 1 P. & D. 21.

2. The Probate Court will act on an informal deed of renunciation which states in substance, though not in terms, that the executor has not intermeddled.—*Goods of Gibson*, Law Rep. 1 P. & D. 105.

3. The fact that one who has unsuccessfully propounded a will is a nude executor, does not relieve him from liability for costs. *Rennie* v. *Massie*, Law Rep. 1 P. & D. 118.

See Administration; Bankruptcy, 2; Executor de son Tort; Limitations, Statute of, 1; Tenant for Life, and Remainder Man, 1.

Executor de son Tort.

1. A settled account, by an executor *de son tort* with the rightful representative before suit, is a good answer to a bill in equity against him for an account.—*Hill* v. *Curtis*, Law Rep. 1 Eq. 90.

2. A person to whom an executor *de son tort* has handed property of the deceased, may perhaps be sued as a constructive trustee, but is not an executor *de son tort*.—*Hill* v. *Curtis*, 1 Law Rep. Eq. 90.

False Pretences.

A person may be convicted of obtaining goods on false pretences, though he intended to pay when he should be able.—*The Queen* v. *Naylor*, Law Rep. 1 C. C. 4.

Fiduciary Relation.—*See* Confidential Relation.

Fixtures.

In ascertaining the gross estimated rental of gas-works, in assessing them to the poor-rate, a deduction should be made in respect of gas-meters belonging to the company, but put upon the premises of consumers, as they are mere chattels; but deductions should not be allowed in respect of retorts, purifiers, steam-engines, boilers, gas-holders, or such trade fixtures as pumps and exhausters, which are fixed to the freehold, but would be removable as tenant's fixtures; for all these, though capable of being removed, are yet so far attached as that it was intended they should remain permanently connected with, and permanent appendages to, the freehold, as essential to the purpose for which the works were made. And it makes no difference, that, by the usual practice in letting gas-

works, the tenant would have to purchase all the above property.—*The Queen* v. *Lee*, Law Rep. 1 Q. B. 241.

Frauds, Statute of.

1. Previously to a marriage, the intended husband and wife agreed in writing, that the husband should have the wife's property for his life, he paying her £80 pin-money, and that she should have it after his death. They gave instructions for such a settlement, which was prepared accordingly, when they agreed to have no settlement; the husband promising, as the wife alleged, to make a will giving her her property. The marriage took place, and the husband made a will accordingly; but afterwards made a different will. *Held*, that there had been no part performance to take the case out of the statute of frauds.—*Caton* v. *Caton*, Law Rep. 1 Ch. 137.

2. If a landlord verbally agrees to grant his tenant a lease for a new term at an increased rent, but dies before executing the lease, payment of a quarter's rent, at the increased rent, before his death, is sufficient part performance to take the case out of the statute of frauds.—*Munn* v. *Fabian*, Law Rep. 1 Ch. 35.

3. The plaintiff having contracted to supply goods to C. for cash, the defendant promised the plaintiff, that, if he would supply the goods to C., drawing upon C. at one month, and would allow the defendant three per cent on the amount of the invoice, he would pay the plaintiff cash, and take C.'s bill "without recourse," —that is, buy the bill of him,—*held*, that this was a promise to answer for the debt or default of another within the 4th section of the statute of frauds.—*Mallet* v. *Bateman*, Law Rep. 1 C. P. 163.

4. A letter, written by A. to his agent, referring to letters of the agent, stating the terms on which the latter has made a contract on A.'s behalf for the purchase of goods, is a sufficient memorandum to bind A. under the 17th section of the statute of frauds.—*Gibson* v. *Holland*, Law Rep. 1 C. P. 1.

5. A written contract was made for the sale of goods, to be delivered within a specified time. Before the time for delivery, the parties agreed orally to extend the time for delivery. *Held*, that the oral agreement was not "good" under the 17th section of the statute of frauds, and could not operate as a rescission of the written contract; which might therefore be enforced.—*Noble* v. *Ward*, Law Rep. 1 Ex. 117.

Heir.

A. gave by will real and personal property to B. for life, remainder to B.'s sons in tail, remainder to his own right heirs. B. died without issue, and, claiming to be A.'s heir, disposed of the property by will. A.'s sole next of kin then filed a bill to recover the personal estate from B.'s executors, alleging that A. left no heir; or that, if he did, it could not be ascertained who was such heir. B.'s executors entered into evidence to prove that B. was heir. The evidence did not establish this, but shewed that A. must have left an heir. The plaintiff offered no evidence. The court refused to direct an inquiry whether there was an heir, and dismissed the bill.—*De Beauvoir* v. *Benyon*, Law Rep. 1 Ch. 212.

Highway.

1. On a bill filed by the vestry of a parish to remove a building over a way, alleged to have been dedicated to the public for forty years, it appeared that for the first twenty years there had been a lease from the owner with a right to build over the way; that then the lease became merged in the inheritance; and that, since, the vestry had claimed the way as belonging to them for the exclusive use of the parish. *Held*, that the suit could not be maintained on its merits.—*Bermondsey* v. *Brown*, Law Rep. 1 Eq. 204.

2. Horses grazing on the side of a turnpike, under control of a man in charge of them, cannot be impounded as "wandering, straying, or lying," about the road, under 4 Geo. IV., c. 95, § 75.—*Morris* v. *Jeffries*, Law Rep. 1 Q.B. 26.

Husband and Wife.

1. A recital in a marriage settlement of an agreement to settle after acquired property of the wife, does not control a covenant by the husband alone without the words "it is hereby agreed," and the wife is not bound.—*Young* v. *Smith*, Law Rep. 1 Eq. 180.

2. If the husband of a woman who has become entitled to property for life, under a will which provides that on her death without children the property shall go to her personal representative, covenants in a a post-nuptial settlement, that all the property which may thereafter, during the period of the joint lives of himself and his wife, devolve on her, shall be her separate property, the above-mentioned property, on the wife's death without children, is not subject to the covenant, and does not go to the executor named in the wife's will, but to the husband as general administrator.—*Wyndham's Trusts*, Law Rep. 1 Eq. 290.

3. A legacy, to which a woman becomes entitled during coverture, may be settled so as to give her husband a life-interest, determinable

on bankruptcy or alienation.—*Montefiore* v. *Behrens*, Law Rep. 1 Eq. 171.

4. The plaintiffs, husband and wife, sued for goods supplied by them in carrying on the business of the wife's father, whose administratrix the wife was. The goods were made of materials purchased from moneys out of the intestate's estate. *Held*, that the wife was wrongly joined, and the husband must sue alone.—*Bolingbroke* v. *Kerr*, Law Rep. 1 Ex. 222.

5. An order enabling a married woman, without her husband's concurrence, to dispose of her revisionary interest in stock, on her affidavit that she was living apart from her husband by mutual consent, will not be rescinded, after the rights of third parties have intervened, on an affidavit of the husband, that, though he generally resided apart from her on an allowance out of her estate, he occasionally visited and slept with her.—*In re Rogers*, Law Rep. 1 C. P. 47.

See Marriage; Power, 5; Separate Use.

Illegal Contract.—*See* Contract; Lease, 3.

Indictment.

An indictment for refusing to aid a constable, and to prevent an assault on him by persons in his custody, with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day as the assault, nor that the assault which the defendant refused to prevent was the same as that which the prisoners made on the constable, nor is it an objection that the assault is alleged to have been made by persons already in custody; and a warrant of a refusal, without an allegation that the defendant did not aid, is sufficient.—*The Queen* v. *Sherlock*, Law Rep. 1 C. C. 20.

Infant.

1. A father, a beneficed clergyman of the Church of England, appointed his widow and a clergyman, guardians of his two infant children. The widow became a member of the sect of Plymouth Brethren. On the application of the other guardian, the court ordered the children, twelve and fifteen years old, to be brought up as members of the Church of England, and restrained their mother from taking them to a chapel of the Plymouth Brethren. The court paid no regard to the fact, that the father was well affected towards dissenters, and associated with them; nor was it influenced by the wishes of the infants.—*In re Newbery*, Law Rep. 1 Eq. 431; and S. C. on appeal, Law Rep. 1 Ch. 263.

2. After a decree absolute for the dissolution of a marriage, on the ground of the husband's adultery and cruelty, the court, being of opinion that neither the father nor mother were fit to be intrusted with the custody of the children, gave it to interveners, relatives of the husband; but directed that the parents should be allowed reasonable access.—*Chetwynd* v. *Chetwynd*, Law Rep. 1 P. & D. 39.

Injunction.

1. A mandatory injunction may be granted where the injury is completed before the filing of the bill, whether the injury is to easements or to other rights; but such injunction will be granted only to prevent very serious damage.—*Durell* v. *Pritchard*, Law Rep. 1 Ch. 244.

2. A claim of a writ of injunction cannot be pleaded to.—*Booth* v. *Taylor*, Law Rep. 1 Ex. 51.

See Carrier, 5; Covenant, 1, 2; Lease, 4; Light, 2; Mortgage, 1; Nuisance; Patent; Principal and Agent, 4; Trade Mark, 3.

Innkeeper.

A licensed victualler cannot be convicted of opening his house on Sunday for the sale of wine, &c., "the same not being for the refreshment of any traveller," if he has opened his house for the *bonâ fide* supply of refreshments to travellers by a railway train, from the mere fact that refreshment has been supplied to persons residing within a mile of his house who did not come by the train.—*Peache* v. *Colman*, Law Rep. 1 C. P. 324.

Insolvency—*See* Bankruptcy.

Insurance.

1. A vessel insured "at and from" Havana was injured by coming in contact with an anchor after entering the harbor of Havana, and whilst passing over a shoal to her place of discharge. *Held*, that the policy had attached. *Haughton* v. *Empire Marine Insurance Co.*, Law Rep. 1 Ex. 206.

2. A ship-owner effected a policy on freight from a colonial port. The master, without the knowledge or privity of the owner, stowed a portion of the cargo, which was timber, on deck; and sailed without any certificate from a clearing officer, that the whole cargo was below deck, contrary to 16 and 17 Vict. c. 107, §§ 170–172. *Held*, that no authority could be implied in the master to load the cargo, so as to violate the statute; neither was it an act of the master which the owner must be presumed to have assented to; that the ship's having sailed without the certificate did not render her unseaworthy so as to prevent the policy attaching; and that therefore the insured could recover on a loss by a peril insured against.—*Wilson* v. *Rankin*, Law Rep. 1 Q. B. 162.

3. A policy of insurance, written on the common printed form of a marine policy, contained the following words:—"At and from I to N., the risk to commence at the lading of the cable on board, and to continue until it be laid in one continuous length between I. and N., and until one hundred words shall have been transmitted each way. The ship, &c., goods, &c., shall be valued at £200 on the Atlantic cable, value, say on twenty shares, at £10 per share;" and also, "it is agreed, that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." The attempt to lay the cable failed, through its breaking while being hauled in to remedy a defect in insulation; but half the cable was saved. *Held*, that the policy was on the "adventure," and the plaintiff could recover for a total loss.—*Wilson* v. *Jones*, Law Rep. 1 Ex. 193.

4. By an insurance policy, plate-glass in the plaintiff's shop front was insured against damage "originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of the premises," none of the glass being "horizontally placed or movable." A fire broke out on premises adjoining the plaintiff's, and slightly damaged the rear of his shop, but did not approach the part where the glass was. While the plaintiff was removing his stock to a place of safety, a mob, attracted by the fire, broke the window for the purpose of plunder. *Held*, that the proximate cause of the damage was the lawless act of the mob, and that the damage was not within the exception. —*Marsden* v. *City and County Assurance Co.*, Law Rep. 1 C. P. 232.

5. An insurance policy on plate-glass windows, effected through L., the local agent of the defendant company, was subject to a condition, that, in case of loss, notice must be given to some known agent of the company. After the making of the policy, but before loss, the defendants transferred this branch of business to another company. *Held*, that notice of loss by the plaintiff (who did not know of this transfer) to L., who made his report thereon to the latter company, was sufficient.—*Marsden* v. *City and County Assurance Co.*, Law Rep. 1 C. P. 232.

6. A mere agent having no lien on goods for advances, commission, or otherwise, nor the possession or custody of them as carrier or other bailee, nor any liability to account for their loss by perils insured against, has no insurable interest in them, though he is named as shipper and consignee in the bill of lading. —*Seagrave* v. *Union Marine Insurance Co.*, Law Rep. 1 C. P. 305.

7. An insurance company paying under a decree on a lost policy are not entitled to any indemnity from the persons to whom payment is made.—*England* v. *Lord Tredegar*, Law Rep. 1 Eq. 344.

See PARTICULARS.

INTEREST.

See MAINTENANCE; MORTGAGE, 3; PARTNERSHIP, 3; VENDOR AND PURCHASER OF REAL ESTATE, 7.

INTERROGATORIES.

1. In an action of trover, an interrogatory to the plaintiff, how, when, and from whom, he obtained the property, was disallowed; as was also an interrogatory as to the plaintiffs's dealings with the person from whom the defendant obtained the cotton, the defendant not making affidavit that there had been any dealings, or that he had made inquiry of that person.—*Finney* v. *Ferwood*, Law Rep. 1 Ex. 6.

2. To an action by surviving partners for goods sold, money lent to, and on accounts stated with, the defendant, by them and their late partner, and to a similar action by the executors of the late partner, the defendant having pleaded a settlement of the account between him and the deceased, by bill not due, interrogatories were allowed to be put to the defendant as to the circumstances of the alleged settlement.—*Hawkins* v. *Carr*, Law Rep. 1 Q. B. 89.

3. In an action for a breach of contract whereby the plaintiff's patent became void, laying as damages loss of profits, the defendants, who had paid money into court, were refused leave to deliver interrogatories to ascertain the probable value of the patent.—*Jourdain* v. *Palmer*, Law Rep. 1 Ex. 102.

4. It is irregular to demur alone to part of a bill when interrogatories have not been filed, and the time for filing them has not expired.—*Rowe* v. *Tonkin*, Law Rep. 1 Eq. 9.

5. A bill may be dismissed for want of prosecution, though the plaintiff's enlarged time for answering interrogatories filed by the defendant has not expired.—*Jackson* v. *Ivimey*, Law Rep. 1 Eq 693.

JOINT STOCK COMPANY.—*See* COMPANY.

JURISDICTION.

If a cause, brought in a superior court, is tried in a county court by a judge's order, the jurisdiction to grant a new trial remains in the superior court.—*Balmforth* v. *Pledge*, Law Rep. 1 Q. B. 427.

Jury.

1. The record of a conviction for a capital felony showed, that, on the trial, the jury being unable to agree were discharged by the judge, and that the prisoner was again put on trial and convicted. *Held*, that the judge had a discretion to discharge the jury, which could not be reviewed on writ of error; and that there was no error on the record.—*Winsor* v. *The Queen*, Law Rep. 1 Q. B. 289. Confirmed on appeal. Law Rep. 1 Q. B. 390.

2. It is no ground for error, either in fact or law, that the whole of the special jurors struck were not summoned; or that the special jury panel was called over and that a *tales* prayed before 10, A. M., the time for which the special jurors were summoned.—*Irwin* v. *Grey*, Law Rep. 1 C. P. 171.

Landlord and Tenant.

1. One who occupies as his own another's land, and before the end of twenty years becomes tenant to that other of land adjacent to the land so occupied, can, while he remains tenant, acquire against the landlord a prescriptive title to the land first occupied.—*Dixon* v. *Baty*, Law Rep. 1 Ex. 259.

2. To raise the presumption that an encroachment on waste land by a tenant was made for the benefit of his landlord, the land encroached on need not be contiguous, in the sense of being coterminous with the land held by him as tenant.—*Earl of Lisburne* v. *Davies*, Law Rep. 1 C. P. 259.

3. If a servant occupies premises of his master, rent free, as part remuneration, if the occupation is subservient to the services, the occupation is that of the master: if it is not so subservient, the occupation is that of a tenant, and the servant is a "substantial householder" within 43 Eliz. c. 2, and therefore eligible as overseer of the poor.—*The Queen* v. *Spurrell*, Law Rep. 1 Q. B. 72.

See Lease; Tenant for Life and Remainder Man, 5.

Lease.

1. A., in 1861, underlet to B. for twenty-one years from Michaelmas, 1861. In 1864, he underlet the same premises to C. for twenty-one years from Michaelmas, 1863, at the same rent. B. never attorned to C. *Held*, that the demise to C. did not pass the reversion, but only an *interesse termini*.—*Edwards* v. *Wickwar*, Law Rep. 1 Eq. 403.

2. An agreement by A., tenant from year to year, to let to B. "all his right, title, and interest" in the premises, provided that, if B. should not be accepted as a tenant by F. and H., the landlords, subject to the terms mentioned in the margin (which were,—"F. and H. agree to grant B. a lease of thirty-five years, at £200 rent, &c."), the agreement should be void, is not well declared on as a contract by A., that F. and H. should grant the lease, and make good title.—*Tweed* v. *Mills*, Law Rep. 1 C. P. 39.

3. A lessee of a house, which he knew had been used many years as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house in the same way. The original lease contained covenants to deliver up in good repair, and not to use as a brothel, and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee had to pay for repairs at the end of the lease. *Held*, that he could not recover the amount so paid from the assignee, everything arising out of the assignment being so tainted with the immoral purpose.—*Smith* v. *White*, Law Rep. 1 Eq. 626.

4. The underlessee of a person, who has covenanted not to carry on a certain trade, will be restrained from carrying it, though such covenant is not in the original lease, but only in an assignment, and though the underlessee had no actual notice of it. So also an assignee of the under lessee.—*Clements* v. *Welles*, Law Rep. 1 Eq. 200.

5. Under a stipulation in an agreement to release to A. without adding "or his assigns," that the lease should contain all usual covenants for the lessor's protection, *held*, that the lease need not contain a covenant against alienation. *Buckland* v. *Papillon*, Law Rep. 1 Eq. 477.

6 In August, 1856, the plaintiff agreed to let a house to the defendant for seven, fourteen, or twenty-one years; the defendant to repair, paint, and paper; and the defendant was let into possession. In 1859, the parties agreed that W. should be accepted as tenant in room of the defendant, upon the same terms, the defendant guaranteeing the rent. W. had just before this been let into possession by the defendant, and paid rent till 1863, when the defendant gave a notice to determine his tenancy at the end of the first seven years. W. and the defendant both denied their liability to paint and paper according to the original agreement. *Held*, on bill filed in November, 1864, that the defendant could not be compelled to accept a lease.—*Moore* v. *Marrable*, Law Rep. 1 Ch. 217.

7. Under an agreement to let a house for three years at a yearly rent, by which the landlord agreed, at the tenant's request, to grant a lease for a term from the expiration of the three years' occupancy at the same rent, the tenant

to keep the house in repair,—*held*, that the tenant was entitled, four years after the expiration of the three years, to have the agreement specifically performed; and that neither application by him two years before for a lease at a reduced rent (which was refused), nor an application for repayment of money spent on repairs (which was allowed), was a waiver, but that he was bound to refund the cost of the repairs.—*Moss* v. *Barton*, Law Rep. 1 Eq. 474.

8. If lands are limited in fee defeasible, but if all persons who would be entitled in any event are before the court, leases may be granted under 1 Wm. IV. c. 65, which enacts, that, if any infant is seised of land in fee or tail, the court may grant leases.—*In re Clark*, Law Rep. 1 Ch. 292.

9. Leases granted by the governor of New Australia, of crown lands, sealed with the public seal of the province, but not enrolled or recorded in any court, are not records, and cannot be annulled or quashed by a writ of *scire facias*.—*The Queen* v. *Hughes*, Law Rep. 1 P. C. 81.

See Frauds, Statute of, 2; Landlord and Tenant; Parties, 2; Power, 3; Rent; Specific Performance, 3; Tenant for Life and Remainder Man, 4, 5.

LEGACY.

1. A testatrix gave to A. for life the interest of £300, or thereabouts, invested by her in a certain company, and the interest of £200; and, after A.'s death, she gave the "said principal sum of £500" to A's. children, and directed, if her personal estate proved insufficient for the payment of legacies, the deficiency should be made up out of her real estate. By a codicil, she gave "all her personal estate" to B. *Held*, that the whole personal estate passed by the codicil; that the legacy of £300 was specific and was revoked, but that the legacy of £200 remained charged on the real estate.—*Kermode* v. *Macdonald*, Law Rep. 1 Eq. 457.

2. A bequest, after the death of J. (to whom an annuity was given out of the fund), to E. for life, but in case of E.'s death during J.'s life, then to M. for life, and after the decease of both E. and M., over: J. died, and afterwards E. *Held*, that M. had a life estate.—*Smith's Trusts*, Law Rep. 1 Eq. 79.

3. A testator, having five sons, gave an annuity to one (a lunatic), and a legacy "to each of my sons," naming only the other four, and directed that his residuary personal estate should be invested in stock, "the interest therefrom to be divided half-yearly between my four sons above-named, and, at the decease of either without lawful issue, such share to revert to the remainder then living, their child, or children." *Held*, 1st. That the four sons only were entitled; and 2nd. That they took only for life, with an estate by implication to their issue, living at their death, as joint tenants.—*Dowling* v. *Dowling*, Law Rep. 1 Eq. 442.

4. Bequests of stock to A. for life, remainder to any wife he might thereafter marry for life or widowhood; remainder to A.'s children absolutely; and if A. should die unmarried and without issue, then, from and after his decease, to B., C., and D., in equal shares; or to such of them as should be living at A.'s death, his, her, or their executors, administrators, and assigns absolutely. A. survived B., C., and D.; and died a widower, without ever having had a child. *Held*, that "*issue*" meant "children;" that "unmarried" meant "without leaving a widow;" and that the representatives of B., C., and D. took the legacy in equal shares.—*Sanders's Trusts*, Law Rep. 1 Eq. 675.

5. In a gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment equally, and, on the death of such of said daughters after twenty-one as should die without issue, her share to be paid to her personal representative,—*held*, that "issue" means children; and "personal representative," administrator or executor.—*Wyndham's Trusts*, Law Rep. 1 Eq. 290.

6. Bequests by will, made in 1857, of "my shares in the Great Western Railway." At the date of the will, testatrix had no shares, strictly speaking, in any railway company; but she had Wilts and Somerset stock of the Great Western Railway, and also preference and other stock of the Great Western Railway, which was increased by further purchase of stock in same company after the date of the will. *Held*, that all the Great Western and Wilts and Somerset stock, held by the testatrix at her death, passed by the bequest.—*Trinder* v. *Trinder*, Law Rep. 1 Ex. 695.

7. Bequest of thirty-three shares in a company among four children, and bequest of "the remaining shares" to a godchild. The testatrix held seventy-four shares, of which thirty-seven were original paid-up shares of £25; and thirty-seven, new £25 shares, on which £15 was paid, and which had been allotted to the holders of original shares by way of bonus. Parol evidence to show that the testatrix was in the habit of treating, and intended to treat, the the shares as double shares (so as to pass to

her godchild four double and not forty-one single shares), *held* inadmissible; but the specific legatees were allowed to take their bequests out of the original shares.—*Millard* v. *Bailey*, Law Rep. 1 Eq. 378.

8. A testator bequeathed as follows,—"The pink coupons are for £3,666: send those to I. & S. [brokers]; and he is to pay to E. T. £2,500, the rest to G for B and E.," and died, Sept. 13, 1864. Pink certificates for £3,666 13s. 4d. railway stock, were found. On Nov. 2, 1864, an administrator was appointed: but the stock was not sold till Nov. 22, 1865; and, meanwhile, a dividend had accrued. *Held*, that the gift to E. T. was a specific legacy; and that E. T. was entitled to a share of dividend accruing on that portion of the stock, which, at the testator's death, would have been needed to realize £2,500.—*Jeffery's Trusts*, Law Rep. 2 Eq. 68.

See Accruer, 2; Husband and Wife, 3; Legatee; Maintenance; Separate Use; Vested Interest, 2; Will.

Legatee.

1. Pecuniary legatees are entitled to stand in the place of the vendor against an estate purchased and devised by the testator, the purchase-money for which, paid after the testator's death, exhausts his personal estate.—*Lord Lilford* v. *Keck*, Law Rep. 1 Eq. 347.

2. Legatees are entitled to costs out of a residuary fund in court, which is insufficient to pay the legacies charged thereon.—*Jarman's Trusts*, Law Rep. 1 Eq. 71.

3. In an administration suit by a residuary legatee, other residuary legatees, having liberty to attend the proceedings, were allowed between them one set of the costs of attending the taking of the accounts, as the plaintiff and the accounting defendant employed the same solicitor.—*Daubney* v. *Leake*, Law Rep. 1 Eq. 495.

See Release.

Light.

1. The erection of a building will not be restrained as obstructing an ancient light, unless the obstruction is such as to materially interfere with the ordinary occupations of life.—*Clarke* v. *Clarke*, Law Rep. 1 Ch. 16.

2 In a suit for obstruction of ancient lights, the court below decreed that the plaintiff was entitled to sufficient light for his business, without any material diminution of his former use; and directed an inquiry whether any alteration in the defendant's building-design was proper, to prevent the interference with the plaintiff's right; and, in the mean time, restrained the defendant from building above a given height. *Held*, on appeal, that the defendant should have been enjoined from erecting any building so as to obstruct the plaintiff's lights, as the same were enjoyed previously to the defendant's acts.—*Yates* v. *Jack*, Law Rep. 1 Ch. 295.

Limitations, Statute of.

1. Payment, by an executor, of interest on a specialty debt will prevent the statute of limitations (3 & 4 Wm. IV. c. 42, § 5) running in favour of a devisee of realty.—*Coope* v. *Cresswell*, Law Rep. 2 Eq. 106.

2. The 31 Eliz. c. 5, § 5, limiting actions on penalties to a year, applies to a suit by one for himself alone, as well as though he sued as an informer *qui tam*.—*Dyer* v. *Best*, Law Rep. 1 Ex. 152.

See Mortgage, 4, 5; Solicitor, 5.

Maintenance.

Testator bequeathed to his son a legacy of £6,000, contingently on his attaining twenty-one. He also bequeathed his residuary estate on trust till said son should attain, or if living would have attained, fifteen, for the maintenance of all his children, and subject thereto for accumulation at compound interest; the aggregate fund to be for all his children contingently on their attaining twenty-one. *Held*, that the son was entitled to maintenance between fifteen and twenty-one; and therefore interest was declared payable on the £6,000.—*Martin* v. *Martin*, Law Rep. 1 Eq. 369.

Malicious Mischief.

A prisoner who plugged the feed-pipe and displayed other parts of an engine, so that it was made temporarily useless, and would have exploded unless the obstruction had been discovered and with some labour removed, was properly found guilty of damaging the engine with intent to render it useless.—*The Queen* v. *Fisher*, Law Rep. 1 C. C. 7.

Marriage.

1. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and, though valid by the *lex loci*, and though both parties were single and competent to contract marriage, the English matrimonial court will not recognize it as a valid marriage, in a suit by one of the parties for dissolution of marriage on the ground of the other's adultery.—*Hyde* v. *Woodmansee*, Law Rep. 1 P. & D. 130.

2. On a suit by a man for dissolution of marriage, evidence that the man and his alleged wife, residing at S., had left S. together, saying that they intended to get married at G.; that,

they returned to S., saying they had been married at G.; that, on the day they left S., there was an entry of the marriage in a book at G., signed by the man; and that, after their return to S., they lived there many years as husband and wife,—*held*, in the absence of better evidence, sufficient proof of the marriage.—*Patrickson* v. *Patrickson*, Law Rep. 1 P. & D. 86.

See Conflict of Laws, 1; Husband and Wife.

Marriage Settlement.—*See* Deed, 3; Frauds, Statute of; Husband and Wife; Power, 4, 5, 6.

Master and Servant.

1. The plaintiff was employed by a railway company to do any carpenter's work for its general purposes. He was on a scaffolding at work on a shed close to the railway, when some porters, in the company's service, carelessly shifted an engine on a turn table, so that it struck the scaffold, and the plaintiff was thrown down and injured. *Held*, that the company was not liable.—*Morgan* v. *Vale of Health Railway Co.*, Law Rep. 1 Q. B. 149.

2. The plaintiff was employed by a railway company as a labourer in loading "a pick-up train" with materials left by plate-layers on the line. It was part of his engagement that he should be carried by the train from B. (where he resided, and whence the train started) to the spot at which his work for the day was to be done, and be brought back to B. at the end of each day. While he was returning to B., after his day's work, the train on which he was, by the negligence of the guard in charge, came into collision with another train; and the plaintiff was injured. *Held*, that the company was not liable.—*Tunney* v. *Midland Railway Co.*, Law Rep. 1 C. P. 291

3. A workman, who had contracted to serve a master for two years, absented himself from service, was convicted under 4 Geo. IV. c. 34, § 2, and committed. The imprisonment expired before the end of the two years; but he refused to return to service. *Held*, that he had committed a fresh offence, and could be again committed, although he *bonâ fide* thought that he could not be compelled to return after imprisonment.—*Unwin* v. *Clarke*, Law Rep. 1 Q. B. 417.

4. To an action of covenant for not teaching an apprentice, it is a good plea, that the apprentice would not be taught, and by his wilful acts prevented the master from teaching him.—*Raymond* v. *Minton*, Law Rep. 1 Ex. 244.

See Embezzlement; Landlord and Tenant, 3.

Mistake.—*See* Tenant for Life and Remainder Man, 3.

Mortgage.

1. A mortgagee, who, holding promissory notes of the mortgagor as collateral security, has transferred the mortgage without the notes, will be enjoined against suing at law on the notes, pending a suit by the mortgagor to redeem and settle the equities of the parties.—*Walker* v. *Jones*, Law Rep. 1 P. C. 50.

2. A mortgagor and his two incumbrancers by deed conveyed the mortgaged estates to trustees, to keep down the interest, and to accumulate the surplus rent, and apply them in payment of the principal, with a final trust for the mortgagor, and declared that nothing in the deed should derogate from the rights of the encumbrancers, and that, after they were paid off, the trusts of the deed should cease. *Held*, that a subsequent judgment creditor of the mortgagor could maintain a bill against all parties to the deed, and have the accounts taken under the deed from the time of filing the bill, without offering to redeem.—*Jefferys* v. *Dickson*, Law Rep. 1 Ch. 183.

3. When a mortgagee on hearing that his son-in-law, the mortgagor, is about to sell the mortgaged property (a house occupied by the mortgagor) to pay the debt, wrote that he might continue to live there without paying any rent, the mortgagor may redeem, on payment of the principal with interest from the last day on which interest fell due, before the mortgagee's death.—*Yeomans* v. *Williams*, Law Rep. 1 Eq. 184.

4. A sum of money, settled on members of a family, was invested on a mortgage of a trust term of the family estates. In 1829, on a re-settlement of the estates, the subsistence of the term and charge was acknowledged. No interest having in the mean time been paid, an arrangement was executed in 1851, by which the tenant for life, under the re-settlement of 1829, acknowledged the term and charge, and paid interest thereon. The tenant in tail, an infant, was not a party. *Held*, that as against the tenant in tail, the term and charge were subsisting, and the statute of limitations did not apply.—*Lawton* v. *Ford*, Law Rep. 2 Eq. 97.

See Production of Documents, 2, 3; Solicitor, 5.

Mortmain.—*See* Deed, 2, 5.

Negligence.

1. A railway was crossed by a public footway on a level, protected by gates on each side. There was no watchman, and the view of the line was obstructed from one of the gates; but,

on the level of the line, it could be seen three hundred yards. A woman, approaching the line through that gate, was detained by a luggage train; and, immediately on its passing, crossed the line, and was run down by a train coming on the further line of rails. *Held*, that there was no evidence of negligence on the part of the company, and that a verdict against them should be set aside.—*Stubley* v. *London & N. W. Railway Co.*, Law Rep. 1 Ex. 13.

2. At the crossing of a railway on a level by a public way, at which there were gates across the carriage way, and a style for passengers, a foot passenger, while crossing the railway diagonally, with head bent down, was run over by a train. The gates on one side of the line were partly open, contrary to the provisions of statutes and the railway rules for the safety of carriage traffic. No gatekeeper was present, though no traffic was passing across, and a train was over due. The court refused to set aside a verdict against the railway company for the injury.—*Stapley* v. *London, Brighton, and S. Coast Railway Co.*, Law Rep. 1 Ex. 21.

3. A railway was crossed by a public road diagonally, and also at the same spot nearly at right angles by a private way. There was a gate across both the public and private ways, under the control of the railway company. The plaintiff with his cart, one evening about dark, being on the private way, the gate being nearly closed, hailed the company's gatekeeper from the opposite side of the railway, to know if the line was clear; and the gatekeeper answered, "Yes; come on." The plaintiff proceeded, and was run into by a train. *Held*, that though 8 Vic. c. 20, § 47, in terms merely imposed the duty on the company to keep the gates closed across a public road, except when carriages, &c., shall have to cross, yet the duty was implied of using proper caution in opening them; and that, as the plaintiff could not get across the railway without passing through the public gate, the gatekeeper should either have opened or refused to open the gate; that what he said was equivalent to opening the gate; and that the defendants were liable.—*Lunt* v. *London & N. W. Railway Co.* Law Rep. 1 Q. B. 277.

4. The staircase, leading from a railway station, was about six feet wide, had a wall on each side, but no hand-rail; and had, on the edge of each step, a strip of brass, originally roughened, but now, from constant use, worn and slippery. The plaintiff, a frequent passenger by the railway, while ascending the stairs, slipped, fell, and was injured. In an action against the company for negligence in not providing a reasonably safe staircase, two witnesses gave as their opinion, that the staircase was unsafe; and one of them (a builder) suggested that brass nosings were improper; that lead would have been better, as less slippery; and that there should have been a hand-rail. *Held*, no evidence of negligence for the jury.—*Crafter* v. *Metropolitan Railway Co.*, Law Rep. 1 C. P. 300.

5. On the premises of the defendant, a sugar refiner, was a hole on a level with the floor, used for raising sugar to the different stories, and necessary to the defendant's business. When in use, it was necessary that the hole should be unfenced; when not in use, it might, without injury to the business, have been fenced. Whether it was usual to fence similar places, when not in actual use, did not appear. The plaintiff being on the premises on lawful business, in the course of fulfilling a contract in which his employer and the defendant both had an interest, without negligence on his part, fell through the hole, and was injured. *Held*, that the defendant was liable.—*Indermaur* v. *Dames*, Law Rep. 1 C. P. 274.

6. The plaintiff, in passing along a highway at night, was injured by falling into a "hoist hole," within fourteen inches of the way and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy while a lease was preparing, and was used by them in raising goods. *Held*, that the defendants were liable.—*Hadley* v. *Taylor*, Law Rep. 1 C. P. 53.

7. The defendant exposed in a public place for sale, unfenced and without superintendence, a machine which could be set in motion by any passer-by. A boy, four years old, by direction of his brother, seven years old, placed his fingers in the machine, while another boy was turning the handle, and his fingers were crushed. *Held*, that no action could be maintained for the injury.—*Mangan* v. *Atterton*, Law Rep. 1 Ex. 239.

See Carrier, 7; Master and Servant, 1, 2.

New Trial.—*See* Damages, 2; Jurisdiction, 3.

Nuisance.

1. A prescriptive right of draining into a stream, to the injury of the plaintiff, can be acquired, if at all, only by the continuance of a perceptible amount of injury for twenty years.—*Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, Law Rep. 1 Ch. 349.

2. Injunction granted to restrain the discharge of sewage of a town into a stream, when the sewage injuriously affected the water, and had done so for many years; and the pollution of the water perceptibly increased as new

houses were built in the town—*Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, Law Rep. 1 Eq. 161; S. C. on appeal, Law Rep. 1 Ch. 349.

3. An injunction was granted restraining a local board of health from permitting sewage to pass through drains under their control into a river, to the injury of a miller residing below the outfall of the drains. The company did not stop the flow of the sewage, but alleged that they had not yet discovered means of deodorizing it; that obedience to the injunction would be practically impossible, without stopping the sewage of the town; that there had been no wilful default; and that a sequestration would be useless, as the property of the Board was public property. *Held*, that there had been a contempt, and sequestration was ordered to issue.—*Spokes* v. *Banbury Board of Health*, Law Rep. 1 Eq. 42.

4. A canal company, empowered by its act of incorporation to take water from a stream, then pure, but since become polluted, had been with its lessees (whose lease was about to expire), indicted for a nuisance, in allowing the foul water to stagnate in their canal; and judgment had been entered against the lessees, who had appealed. To an information against the company and their lessees, the company admitted the polluted state of the water, but insisted on their right to draw it, however foul; and said they should probably continue to draw it on the expiration of the lease. *Held*, that the appeal pending at law was not a bar to an injunction; that it was no answer to say that the company did not pollute the water, as they could draw it or not, as they pleased; nor to say that the informants might be left to their legal remedies; nor to say that a worse nuisance would be created in the stream; nor to say that the lessees were the active offenders, inasmuch as the company had set up their rights in the answer: and injunction was granted to commence after eight months.—*Attorney General* v. *Proprietors of the Bradford Canal*, Law Rep. 2 Eq. 71.

5. In an injunction to restrain the pollution of a stream, it is proper to insert the words, "to the injury of the plaintiff."—*Linwood* v. *Stowmarket Co.*, Law Rep. 1 Eq. 77.

6. If a judgment at law has been obtained for a nuisance affecting real estate, and substantial damages given, an injunction will almost of course be granted to prevent the continuance of the nuisance.—*Tipping* v. *St. Helen's Smelting Company*, Law Rep. 1 Ch. 66.

Parol Evidence.—*See* Carrier, 6; Legacy, 7; Will, 6.

Particulars.

In an action on a life policy, the defendant having pleaded, that the proposals declared that the life insured had not had symptoms of certain diseases, or any other complaint, whereas he had had symptoms of disease of the stomach, the court ordered particulars of the symptoms delivered.—*Marshall* v. *Emperor Assurance Society* Law Rep. 1 Q. B. 35.

See Patent, 5, 6.

(To be continued.)

GENERAL CORRESPONDENCE.

Articled Clerks—Admission.

To the Editors of The Law Journal.

Gentlemen,—I was articled in July, 1863, and consequently would go up for admission in Trinity term, 1868. Would the Law Society, having as I understand abolished Trinity Term, allow me to go up for admission in Easter Term in that year? I have myself come to the conclusion that they would, from a few remarks of yours in the *Law Journal* of 1865, page 192.

It would be too bad to throw a great number of us back for four or five months. An early answer will oblige several

Law Students.

[Our information leads us to think that such a conclusion is incorrect. The Benchers have in this case no discretion, and cannot, as they can in some cases, permit a clerk to go up for examination before his time is out, and even when they can exercise their powers in favor of the student, he cannot be sworn in until his time is fully up. You could not therefore, unless we are misinformed, go up either for examination or admission until Michaelmas Term.—Eds. L. J.]

Appointment of Official Assignees.

To the Editors of the Law Journal.

Gentlemen,—Just before the publication of your article in the last issue of the *U. C. Law Journal*, a question of some importance upon the subject referred to, came up, as questions do very frequently arise, upon which I should like to see some discussion in your Journal.

The creditors prosecuting a compulsory proceeding by attachment in insolvency, applied to the judge of the County Court here, under the 13th sub-section of the 3rd section of the Insolvent Act of 1864, for an order appointing

a meeting of creditors to be held before the judge of and in another county. Our judge did not refuse, but granted the order as asked for, intimating, however, that although he was aware some other county judges had made similar appointments, he himself entertained grave doubts as to its legality, for that the words of the 18th sub-section failed to satisfy him that he was at liberty to impose such a duty upon the county judge of another county, or that the duty could be discharged at all by any one out of the county where the proceedings were being carried on; that there was nothing in the statute to require the judge of the other county to discharge the duty, and he might well say, upon such an appointment being made for him, that his own appointments were all that he could reasonably be supposed to keep, and that the duties of his own courts were all that he could attend to.

At a subsequent day, the plaintiff's solicitor, not wishing to risk a large estate upon so doubtful a question, got the appointment changed, ordering the meeting to be held before the judge here. In a subsequent case, a similar order to the first was asked for, appointing the meeting to be held in a distant city, before another judge, when the judge of this county, having more maturely answered the question, refused, decidedly, to grant the order, and referred to the words of the interpretation clause of the act; that is, the 4th sub-section of the 12th section, as explaining the words, "*The Judge*," and the words, "*or any other Judge*" (where they respectively occur) in the 13, 14, 17, 18, 19, 20, 21, & 23rd sub-sections of the same act. That by the 4th sub-section of the 12th section, those words, as applicable to Lower Canada, may be understood, because it is well known that the judges of the Superior Courts of Lower Canada have not merely jurisdiction over a county, for there are several Superior Court judges having jurisdiction equally over the same section or territory, which is not the case in Upper Canada, unless there is a junior judge in the same county with the senior judge; that the jurisdiction in Upper Canada is purely local, confined to one county, held only by resident judges, and that, therefore, whilst the words "*any other Judge*" may mean a junior or a deputy judge of the *same* county, they could not be intended to mean a judge of the County Court of *another* county, because he could not by any reasonable intendment be held to be the judge of the County Court of the county in which the proceedings are carried on.

And again, that supposing the 13th sub-section might authorize the meeting of creditors to take place before such other judge, that "*other Judge*" could only take the advice of the creditors upon the appointment of an official assignee; he could not *appoint* the assignee, because the 14th sub-section provides that "at the time and place appointed, and on hearing the advice of the creditors present upon oath," &c., "*The Judge*" (and not the "*other Judge*") shall appoint, &c. *** and if the creditors are not unanimous, then "*the Judge*" may appoint, &c.

Our judge maintains that the words "*The Judge*" can only mean such judge as the interpretation clause points out, and that the 17th and subsequent sub-sections of the 3rd section prove this position.

Will you, Messrs. Editors, favour us with your views on this question, or invite the correspondents of the *U. C. Law Journal* to discuss it, because it is said that the whole "*Bar*" of the city of Hamilton are unanimous in an opinion adverse to that entertained by the judge and bar here.

Oblige,

Yours respectfully,

A Subscriber.

20th February, 1867.

[We have not at present time to devote to the consideration of the subject above referred to, but we should be glad in the mean time to hear from those who may have had occasion to investigate the point, which is, we believe, a new one and of great importance.]—Eds. L. J.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JOHN COYNE, of Brampton, Esquire, Barrister-at law, to be a Notary Public for Upper Canada. (Gazetted 23rd February, 1867.)

JOHN McKINDSEY, of Bothwell, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted 23rd February, 1867.

CORONER.

CABEL ELSWORTH MARTIN, of Lindsay, Esquire, M.D., to be an Associate Coroner for the County of Victoria. (Gazetted 23rd February, 1867.)

TO CORRESPONDENTS.

"Law Student" — "A Subscriber" — Under "General Correspondence."